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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

June 4, 2010

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[COPY]

Taken before *D'Lois L. Jones*, Certified  
Shorthand Reporter in Travis County for the State of  
Texas, reported by machine shorthand method, on the 4th  
day of June, 2010, between the hours of 9:03 a.m. and  
2:26 p.m., at the Texas Association of Broadcasters, 502  
East 11th Street, Suite 200, Austin, Texas 78701.

**INDEX OF VOTES**

Votes taken by the Supreme Court Advisory Committee during this session are reflected on the following pages:

<u>Vote on</u>	<u>Page</u>
Rule 5.1	20233
Rule 5.1	20252
Rule 5.1	20280
Rule 5.1	20300
Recusal, subparagraph (10)	20351
Recusal, subparagraph (11)	20351
Recusal	20397

**Documents referenced in this session**

10-09 TRCP based on FRCP 5.1

10-10 Recusal grounds memo - 18b (11-16-09)



1 probably heard. We'll miss her a great deal in her  
2 service to the Court.

3           Then, let's see, in the way of personal  
4 items I understand Judge Christopher's daughter is  
5 graduating the SMU law school this month and is going to  
6 work as a law clerk for Justice Medina, and her son is  
7 graduating the University of Texas, so she still has a  
8 daughter I think in graduate school, so cutting down the  
9 expense a little bit, but still up there.

10           Professor Hoffman is engaged to be married.

11           CHAIRMAN BABCOCK: Oh, there we go.

12           (Applause)

13           HONORABLE NATHAN HECHT: He proposed in  
14 Santa Fe, and I understand serenaded his fiancée, but she  
15 accepted.

16           (Laughter)

17           HONORABLE NATHAN HECHT: Lonnie and I  
18 attended the Federal rules meeting in May, which was --

19           PROFESSOR HOFFMAN: And apparently had a not  
20 so private conversation about --

21           HONORABLE NATHAN HECHT: Yeah. This is  
22 family. Billed as a meeting to solve all the Federal  
23 courts' problems, and they talked about a lot of the  
24 problems such as they are, and I'm not sure what was  
25 solved, but anyway, there is a website of materials from

1 that conference that has papers, study papers, and  
2 analyses and all sorts of studies about electronic  
3 discovery and lots of other issues that you might want to  
4 use as a resource if you want, and Lonny or I can give you  
5 the e-mail -- I mean the internet site, which I don't have  
6 off the top of my head, but I can get it for you.

7           The Court completed the revision of the  
8 disciplinary rules, and they're out and in the process of  
9 being worked on by the bar still, and eventually they'll  
10 be voted on by the bar, although I'm not exactly sure when  
11 that will be, but it might be next spring.

12           MS. PETERSON: Might be next fall.

13           HONORABLE NATHAN HECHT: Might be in the  
14 fall, but we have a lot of comments. Many of the comments  
15 are along the line of, "Well, I never knew it said that,  
16 and so I'm not for that," but they are very complex rules,  
17 of course, very important to the discipline of the bar, so  
18 we need to take a hard look at those before they get voted  
19 on.

20           Then the Court has issued an order requiring  
21 that materials to the Court be submitted, not filed, but  
22 submitted in electronic form by e-mail and in searchable  
23 form. So briefs, motions, those sorts of things,  
24 appendices, all have to be submitted now to the Court  
25 electronically; and this is a preface to e-filing in the

1 appellate courts, which will begin soon, maybe in the  
2 fall. We're still working on the software to make it  
3 possible for the appellate courts to make full use of  
4 electronic filing so that they can easily find briefs and  
5 records and things that they're working on. But that's  
6 coming, and I think several courts use the e-mail -- have  
7 the e-mail requirement already. I know Dallas does. Do  
8 the Houston courts, Jane?

9 HONORABLE JANE BLAND: We scan everything.

10 HONORABLE NATHAN HECHT: Scan everything.  
11 So that's -- that change is in the offing, and I think  
12 before the end of the year -- I hope before the end of the  
13 year there will be e-filing in at least some of the  
14 appellate courts. The civil information sheet, the  
15 so-called cover sheet that the committee worked on, has  
16 been adopted and is out for comment and will take effect  
17 on September the 1st, the beginning of the fiscal year so  
18 that OCA can begin to obtain more reliable statistics in  
19 regards to case filings across the state. And then  
20 finally, we made a few revisions in the Uniform Format  
21 Manual for court reporters, and, again, they're sort of  
22 having to get ready for e-filing as well because the  
23 e-filing will include not just the briefs and papers  
24 submitted by lawyers, but the clerk's record and  
25 reporter's record, so it will be a complete change, so

1 those changes were in part to accommodate that. And I  
2 think that's it.

3 CHAIRMAN BABCOCK: Okay.

4 MR. HAMILTON: Did you say that had already  
5 started in the Supreme Court, e-filing?

6 HONORABLE NATHAN HECHT: Not filing, but  
7 submission.

8 MR. HAMILTON: Submission.

9 HONORABLE NATHAN HECHT: Yes. You still  
10 have to file the paper copies, but you also have to send  
11 the Court -- transmit by e-mail an electronic version  
12 in PDF format that's searchable. So all of the briefs and  
13 motions and papers that the Court gets now are on --  
14 excuse me, are online, and available for outsiders to look  
15 at as well. They're on the Court's website.

16 CHAIRMAN BABCOCK: Justice Medina, anything  
17 you want to add to that?

18 HONORABLE DAVID MEDINA: No, he said it all.

19 CHAIRMAN BABCOCK: You don't have any  
20 stories about Lonny or anything?

21 HONORABLE DAVID MEDINA: Justice Hecht  
22 promised -- I promised I wouldn't say anything, save it  
23 for later.

24 CHAIRMAN BABCOCK: There you have it. Now,  
25 Frank, with that build up.

1 MR. GILSTRAP: Thanks. The document we're  
2 going to be working off of is a one-page sheet entitled,  
3 "Proposed Texas Rules of Civil Procedure patterned after  
4 Federal Rule 5.1." It's available on the table. It's  
5 only one page, but it is front and back. We presented --  
6 as you know, the -- we've been instructed to draft a rule  
7 that will ensure that the Attorney General is notified  
8 whenever in a case the constitutionality of a statute is  
9 questioned. The Federal -- there's a Federal rule and a  
10 Federal statute. We are working off Federal Rule 5.1.  
11 That has been our goal. That was the framework for  
12 discussion last time, and at the end of the discussion  
13 Richard Orsinger was told to go ahead and prepare a  
14 version that included everything we had talked about and  
15 give it to us and we would take a shot at it, and that's  
16 what we're doing today.

17 That's the top half of the page. The bottom  
18 half is Richard's interpretive commentary, which is  
19 Richard's view. I don't think it really is -- is  
20 necessarily the committee's view, but it's like anything  
21 Richard does, it's always interesting and helpful. I'm  
22 not -- I don't think we need to go back and beat a dead  
23 horse, and the dead horse in this instance is whether this  
24 applies to challenges to constitutionality of a statute on  
25 its face or as applied. We had quite a lot of discussion



1 about that last time. I don't think we reached any  
2 resolution, and I'm not sure a resolution can be reached,  
3 so as a result Richard just kept the language from the  
4 Federal statute, which says that it's applicable whenever  
5 there is a pleading or motion that draws into question the  
6 constitutionality of the Texas statute.

7           As Justice Hecht pointed out, the Federal  
8 rule uses that because it's in the Federal statute, and we  
9 don't have to do that, but at the same time, the Federal  
10 rule seems to work, and, you know, I don't propose to go  
11 back and get into that debate again, at least I don't want  
12 to, because I don't think it's going to solve anything.  
13 There is something I think we could address fairly quickly  
14 because we did talk about it a lot last time, and that is  
15 whether or not it's going to apply only to a statute. You  
16 know, it's -- the Declaratory Judgment Act, as you know,  
17 requires notification of the Attorney General in any  
18 declaratory judgment action involving the  
19 constitutionality of a statute, ordinance, or franchise,  
20 and we had some discussion that we really don't know what  
21 franchise means and maybe don't know what ordinance means.  
22 We did discuss the possibility of extending this to suits  
23 that question the constitutionality of agency rules, local  
24 ordinances, as in declaratory judgment statute. You could  
25 open up the whole Pandora's box, school board policies,

1 that type thing.

2           The result that we have here, though, is  
3 only statute, and I think -- frankly, I went back and read  
4 the transcript. I could not tell what the Attorney  
5 General's position was on this, and the Attorney General's  
6 first position is they don't comment on pending proposed  
7 legislation, so maybe that's proper. I think we could  
8 probably just go ahead and vote on that, do we limit it to  
9 statutes or do we include more than statutes. My own  
10 personal view on that is this, that this is an expansion,  
11 this is an expansion beyond what's required in the  
12 declaratory judgment statute because that only applies to  
13 declaratory judgments. The Attorney General is, first of  
14 all, interested in statutes, and it seems to me that  
15 rather than trying to eat the elephant all at once we  
16 might go ahead and propose statutes and see how that  
17 works, but that's just my own personal view, and I don't  
18 know how much more discussion we need, but that might be  
19 something we could resolve at this point at least to the  
20 extent we can resolve anything.

21           CHAIRMAN BABCOCK: Okay. Anybody have any  
22 views on limiting it to statute? Carl.

23           MR. HAMILTON: Well, I think because the  
24 Civil Practice and Remedies Code includes more than that,  
25 I think if we're going to write a rule we ought to include

1 it also.

2 CHAIRMAN BABCOCK: Okay. Buddy.

3 MR. LOW: And, I mean, not every -- like  
4 Railroad Commission rule or regulation, which is pretty  
5 important, would be involved, the agency. Maybe it's two  
6 landowners and one of them sues. That's not declaratory  
7 judgment. They say, "You're draining my oil," the  
8 Attorney General probably might not want to hear about  
9 that, but I don't know that he would be bound or that  
10 would make the law unconstitutional, but that wouldn't be  
11 covered by declaratory judgment.

12 MR. GILSTRAP: I think it was mentioned last  
13 time there is a section in the Government Code that  
14 requires the Attorney General to be notified when an  
15 agency rule, the constitutionality of an agency rule, is  
16 being questioned. I do recall that.

17 CHAIRMAN BABCOCK: Okay. Judge Evans, you  
18 had your hand up? No?

19 HONORABLE DAVID EVANS: No.

20 CHAIRMAN BABCOCK: Okay. Anybody else?  
21 Gene.

22 MR. STORIE: I had a feeling -- and I don't  
23 necessarily trust my memory, but I had a feeling that the  
24 Attorney General would prefer to include rules, and I'm  
25 not sure I see any harm in doing so. I mean, I know that

1 is opening up things more, but it does occur to me that  
2 you could have some context in which the constitutionality  
3 of a rule is in question between two private parties; and,  
4 of course, you have -- I think as Pete mentioned in mailed  
5 in comments maybe, you have a possibility of directly  
6 challenging a rule, but again we're dealing here with just  
7 litigation between private parties.

8           CHAIRMAN BABCOCK: Yeah, my recollection is  
9 many years ago, maybe 15, 20 years ago, there was a  
10 dispute about what the burden of proof was going to be for  
11 termination of parental rights, and somebody got all the  
12 way to the U.S. Supreme Court on the issue. I don't know  
13 if it was a Texas case or not, but there would be an  
14 instance where somebody is challenging the  
15 constitutionality of a rule on burden of proof, and the  
16 Attorney General would surely be interested in that, in  
17 that setting. Maybe not in all settings, but just a  
18 thought. Anybody else? Yeah.

19           HONORABLE TOM GRAY: His answer to the  
20 question about -- and this was from the note that was in  
21 First Assistant Ho's response to I think an e-mail inquiry  
22 from Richard, was that, yes, the committee may wish to  
23 conclude that the state should be notified and have the  
24 opportunity to intervene, whether the target of the  
25 constitutional challenge is a state statute or agency rule

1 or regulation, so although he was unwilling in the meeting  
2 to take a position on it, it certainly seems to be  
3 inclined that given the purpose of the rule, which is in  
4 effect giving the AG the opportunity to see if they are  
5 interested in becoming involved in a piece of litigation  
6 that may impact the constitutionality of some regulatory  
7 device, it seems to be worthwhile to give them the notice.

8 I do have to add the caveat that -- and I  
9 hate to tie votes together, and I know that you don't, but  
10 a lot of this has to do with what happens -- what's the  
11 result if notice is not given.

12 CHAIRMAN BABCOCK: Yeah.

13 HONORABLE TOM GRAY: If it's as Richard  
14 suggested then I've got a different problem, but I'll try  
15 to keep the votes independent.

16 CHAIRMAN BABCOCK: Okay. So the  
17 alternatives would really be as drafted or it would say  
18 "the constitutionality of a Texas statute," comma, "rule  
19 or regulation."

20 MR. LOW: Well, I would say "administrative  
21 rule or regulation of a state agency."

22 CHAIRMAN BABCOCK: Well, it may not be  
23 that -- I mean, there can be rules -- I mean, people can  
24 challenge the Rules of Civil Procedure as being  
25 unconstitutional. But I hear what you're saying. You

1 could limit it to agency rules.

2 MR. LOW: Yeah.

3 CHAIRMAN BABCOCK: Carl.

4 MR. HAMILTON: Are you intending to confine  
5 it just to the state level, or are you going to leave out  
6 the ordinances, city ordinances?

7 CHAIRMAN BABCOCK: That's another issue.  
8 Frank.

9 MR. GILSTRAP: Well, you know, that's the  
10 problem, because certain declaratory judgment action talks  
11 about ordinances or franchises, and we had some discussion  
12 last time that, you know, we're not sure what "franchises"  
13 means. You know, where do you stop? Where do you stop?  
14 You know, one of the most common rule -- you know, sets of  
15 rules are school board policies, and they are frequently  
16 challenged on constitutional grounds. You know, the  
17 question for me is that I'm moved by the fact that there's  
18 no neat solution here, and wherever you stop it's going to  
19 be sort of arbitrary, and my feeling is stop at the  
20 statutes.

21 CHAIRMAN BABCOCK: Okay. Yeah, Harvey.

22 HONORABLE HARVEY BROWN: It wouldn't seem to  
23 me that the Attorney General would have a strong interest  
24 in some small town's ordinance being declared  
25 unconstitutional, so if the purpose is to notify the AG, I

1 don't think the ordinance probably needs to be covered.  
2 It seems to me he's interested in Texas laws, things that  
3 apply to the entire state, so if the word "Texas" is in  
4 there first and then says "statute or rule or regulation,"  
5 it would probably rest his concerns or her concerns.

6 CHAIRMAN BABCOCK: Justice Gray.

7 HONORABLE TOM GRAY: I would argue the AG  
8 does have a real strong interest in a lot of ordinances  
9 because they involve speech. We had one in Waco that was  
10 picketing an abortion clinic. You've got them all the  
11 time where they've got -- they're in a school zone. It  
12 happened to be actually an abortion picketer in a school  
13 zone, and so we wound up with a lot of interest in that  
14 case. You've got the ordinances out of the north of  
15 Dallas area, I forget which, maybe Farmer's Branch,  
16 regarding immigration status. There are those ordinances  
17 that those little entities draft and try to implement that  
18 are affecting massive rights, if you will, of a lot of  
19 different citizens that the AG does want to get involved  
20 in, and unfortunately, if it's only at the time after --  
21 if, you know, Judge Evans has declared it  
22 unconstitutional, then or -- or constitutional, whichever  
23 the case may be --

24 HONORABLE DAVID EVANS: Well, it will  
25 change.

1 HONORABLE TOM GRAY: -- it may be too late.  
2 So I for one like the scope of the way the Declaratory  
3 Judgment Act includes it, although I would leave out the  
4 franchises, since nobody seems to know exactly what that  
5 means.

6 CHAIRMAN BABCOCK: Yeah, I remember this may  
7 be a thing of the past, but news rack ordinances where the  
8 cities, municipalities, tried to say, "Okay, only the  
9 *Dallas Morning News* can have a news rack on the corner."  
10 *Dallas Times Herald* says, "No, that's not right." Any  
11 other comment? Yeah, Richard.

12 MR. MUNZINGER: It would seem to me that if  
13 you included local ordinances you might be imposing some  
14 kind of unspoken obligation on the Attorney General to  
15 intervene in cases where he otherwise or she otherwise  
16 might not want to do so. If the Attorney General is  
17 notified that a constitutional issue is raised in some  
18 litigation and does nothing about it, what implication  
19 does that make, what policy implication does it make?  
20 Does it have any kind of legal effect elsewhere? That the  
21 City of Waco doesn't want abortion protesters in school  
22 zones, or whatever it might be, doesn't really impact the  
23 people of El Paso unless and until the Legislature or the  
24 Texas Supreme Court adopts some kind of a rule that  
25 implements or refuses to implement that ordinance, and so



1 here the Attorney General is now forced to make some --  
2 not forced to, but certainly encouraged or pressured to  
3 make some kind of policy decision respecting whether the  
4 state does or doesn't intervene in all the various ways  
5 that local communities solve the local problems.

6 I don't think that's wise. I think it's  
7 better to let cities tussle this out themselves and then  
8 if you have to reach a state policy you do so after cities  
9 have had multiple experiences with it. I would be opposed  
10 to any rule that would adopt the language of the  
11 declaratory judgment statute requiring such notice in  
12 these situations, and I think it ought to be left to  
13 statute and at the most state regulatory agencies.

14 CHAIRMAN BABCOCK: Okay. Any other  
15 comments? Okay. So since Frank's proposal is to limit it  
16 to Texas statute, let's vote on that. Everybody -- and  
17 without regard to if we're going to expand it, how much  
18 we're going to expand it. Does that seem like the right  
19 way to do it, Frank?

20 MR. GILSTRAP: That seems like the right way  
21 to do it to me, yes.

22 CHAIRMAN BABCOCK: Okay. So everybody  
23 that's in favor of limiting it to the language that we  
24 have here on the draft rule, that is it would be limited  
25 to the constitutionality of a Texas statute, raise your

1 hand.

2                   Everybody opposed, raise your hand. Okay.  
3 The ayes have it by a vote of 9 to 5, Chair not voting, so  
4 there we go. So next issue.

5                   MR. GILSTRAP: Okay. The next issue is a  
6 nonissue, but I'm just going to point it out. When we --  
7 when I did my draft of the statute I mistakenly said that  
8 this should not apply when suit is filed against any state  
9 agency or officer or the state. As was pointed out during  
10 the last meeting, the Attorney General is not the state.  
11 That's a complicated relationship, but the purpose is to  
12 give notice to the Attorney General, and the Attorney  
13 General may not know if the state -- if some state officer  
14 has been sued, so the purpose of the statute is to give  
15 notice to the Attorney General, and so what we've done is  
16 we've said that the statute is -- that obviously notice  
17 doesn't have to be given if the Attorney General is  
18 already participating as a party or an attorney.

19                   That's the point of the last two clauses in  
20 (a)(1) and (b). Both say that those provisions are not  
21 applicable if the Attorney General-- is applicable only if  
22 the Attorney General is not already participating in the  
23 litigation as either a party or counsel. I think  
24 that's -- I don't believe anybody will have any objection  
25 to that based on last meeting's discussion. My only

1 suggestion would be that we could be a little bit cleaner  
2 if we took those two exceptions, those two provisions, and  
3 made them into a single provision at the end which said  
4 the rule is not applicable to those cases, but unless  
5 somebody has -- wants to get into whether or not notice  
6 should be given to someone besides the Attorney General, I  
7 would say, well, let's move on.

8 CHAIRMAN BABCOCK: Okay. Any comments about  
9 that? Yeah, Justice Gray.

10 HONORABLE TOM GRAY: Just as far as the  
11 positioning, I had structurally put that actually at the  
12 beginning of the clause where it would start off the  
13 subsection (a), "If the Attorney General is not already  
14 participating in the litigation as either a party or  
15 counsel," then you get to the notice by the party with two  
16 subsections and then the notice by the court.  
17 Structurally I thought that worked.

18 MR. GILSTRAP: And you would do the same  
19 with (b) as well?

20 HONORABLE TOM GRAY: Actually, you would put  
21 the subsection (a) --

22 MR. GILSTRAP: Oh, I see.

23 HONORABLE TOM GRAY: -- as two subparts,  
24 which is now (a) and (b), and what is currently (a) then  
25 winds up with subparts -- or actually, it's (a) with

1 subparts (1) and (2), and then it changes the caption  
2 title or the numbering system, but you do away in effect  
3 with one of the subsections when you do it that way, but  
4 you make one section that it just starts off with the  
5 caption. I can show you mechanically what I'm talking  
6 about, but you skipped over a provision that I want to  
7 back up to, to naming, but I'll leave the discussion to  
8 this.

9 MR. GILSTRAP: Name of the statute?

10 HONORABLE TOM GRAY: No, the -- you referred  
11 to the "drawing into question" language, and I really want  
12 to -- I do want to revisit that.

13 MR. GILSTRAP: That's the on its face or as  
14 applied. Okay. Let me push that to the end.

15 CHAIRMAN BABCOCK: Yeah.

16 HONORABLE TOM GRAY: Well, it's really not  
17 a -- I don't intend it to be an as applied question at  
18 all. It's just the terminology that we use throughout the  
19 statute is inconsistent, and that's where it starts.

20 MR. GILSTRAP: Why don't you go ahead and  
21 say it, please.

22 HONORABLE TOM GRAY: Well, I worked  
23 backwards from subsection (c) because when I got to  
24 subsection (c) was the first time I had seen the word  
25 "after the court certifies the challenge," and I looked

1 for the word "challenge" anywhere prior to that, and it's  
2 not there, and that's when I realized that we really use  
3 about three different, four different phrases or  
4 references to what it is we're doing. We first use  
5 "drawing into question" in subsection (a). Then in what  
6 is currently subsection (a)(1) we use the term "stating  
7 the question" or "constitutional question," and then in  
8 the same subsection it says "paper that raises it," not  
9 sure whether "it" is the constitutional question or the  
10 paper stating it, but anyway, you get on down and then  
11 there's a -- the reference to "challenge."

12           So there's at least three, maybe four,  
13 references to is it a constitutional question, is it  
14 drawing into question, is it a challenge; and I think the  
15 word "challenge" works the best; and if you back that up  
16 all the way into subsection (a) where it says "a party  
17 challenging the constitutionality of" works the best and  
18 then each time the word "question" appears, you can use  
19 the word "challenge"; and mechanically that works fairly  
20 well throughout the rule.

21           MR. GILSTRAP: All right. Okay.

22           HONORABLE TOM GRAY: And then just as maybe  
23 another gnat, I don't know, but where the Federal rule  
24 uses the term "paper" I would change every "paper" to  
25 "document" to accommodate the concept of electronic

1 documents.

2 MR. GILSTRAP: Ah, very good. Okay. This  
3 is one that we really didn't discuss, and it's new in the  
4 rule, but -- and that is this, the rule is premised on the  
5 notion that the parties have to notify the Attorney  
6 General in the event of a challenge to the  
7 constitutionality of a statute. The Federal rule also  
8 requires the judge to certify to the Attorney General, and  
9 when we drafted this initially we thought we would leave  
10 that out because it didn't seem necessary, and after all,  
11 the Feds had a lot more money to do those things.  
12 However, that raised -- there was still the problem --  
13 what if none of the litigants notified the Attorney  
14 General. So Richard's solution was in (c), which is new,  
15 and it says, "In the event a constitutional question is  
16 raised sua sponte by the court, the court must certify to  
17 the Attorney General that a statute has been questioned,  
18 identifying the statute, stating the question, identifying  
19 any paper that raises it" -- "and identifying any paper  
20 that raises it." So I guess we need to talk about that.  
21 I mean, the whole idea is to get the Attorney General  
22 notified, and I guess it makes sense that if the lawyers  
23 haven't done it, the judge needs to do it. But that's the  
24 purpose of it. It might be done or said better.

25 CHAIRMAN BABCOCK: Yeah, Carl, then Buddy.

1 MR. HAMILTON: How does the judge do that?  
2 So the judge says from the bench, "Well, this statute may  
3 be unconstitutional." There's no pleadings, the parties  
4 have not raised it in any document, so how does the judge  
5 generate a document then that raises that challenge?

6 CHAIRMAN BABCOCK: Buddy.

7 MR. LOW: Yeah, did --

8 CHAIRMAN BABCOCK: Buddy's got the answer.  
9 That's why he's got his hand up.

10 MR. LOW: No, I just have questions. Did  
11 the committee discuss something like a certificate of  
12 compliance? I know I in Federal court had to certify that  
13 I had complied with that requirement, that I had -- and  
14 you certify it, you know, you can -- Judge Gray wants to  
15 know about what's the effect, it wouldn't be good for me  
16 if I certified that I complied and didn't. Did y'all  
17 discuss certificate of compliance?

18 MR. GILSTRAP: No, I don't think we did.

19 CHAIRMAN BABCOCK: No.

20 MR. GILSTRAP: In answer to Carl's question,  
21 though, it does say in (b) "any paper that raises it," so  
22 arguably if there's no paper the judge doesn't have to  
23 send it in. If it is truly a sua sponte challenge from  
24 the brow of the judge and not the litigants then he  
25 wouldn't have to send the paper in.

1                   CHAIRMAN BABCOCK:  Yeah, Harvey.

2                   HONORABLE HARVEY BROWN:  I'm not sure we  
3 want to encourage a judge to sua sponte raise a  
4 constitutional issue.  I mean, if no party has raised the  
5 issue, I don't know that we want judges to be thinking  
6 kind of like advocates that maybe there's a problem here  
7 that none of the advocates have thought of.  You know,  
8 when Frank first described the purpose of this section I  
9 thought it was basically a default that if parties forget  
10 or don't notify the Attorney General then the court will  
11 do that, but that's still the parties raising it.  This  
12 seems to me is a completely separate question the way you  
13 drafted it from what you said the purpose was.

14                   CHAIRMAN BABCOCK:  Yeah, Carl's question is  
15 a good one.  I'm trying to think of situations where a  
16 judge would sua sponte say, "By the way, guys, this  
17 statute is not constitutional."

18                   HONORABLE TOM GRAY:  The only one where I  
19 could even begin to think that it would be appropriate for  
20 me as a judge to do that would be if it somehow touched on  
21 my jurisdiction, and beyond questioning my jurisdiction, I  
22 don't think I've got any authority or business framing the  
23 issues for the parties.

24                   CHAIRMAN BABCOCK:  Yeah.

25                   HONORABLE TOM GRAY:  I mean, we've got a



1 case or had a case that I had all kind of issues that I  
2 had with the way the parties had briefed it and every -- I  
3 mean, it was one of those cases that you want to bury  
4 because you don't want to create that as precedent because  
5 the issues that you're having to be -- being asked to  
6 answer are so bad and off the mark of what the law is or  
7 ought to be, that you just -- you don't even want other  
8 people to see it, but you've got to answer the questions  
9 presented, and if we get to start framing the question,  
10 I --

11 CHAIRMAN BABCOCK: As you were talking --

12 HONORABLE TOM GRAY: I just don't think  
13 y'all want that.

14 CHAIRMAN BABCOCK: As you were talking,  
15 Justice Gray, I can imagine a situation where like let's  
16 say the Citizens United case, say there's a state statute  
17 that prohibits the distribution of a campaign film within  
18 a certain number of days within the election; and they're  
19 in court and the judge says, "Well, I understand all your  
20 positions, but this thing doesn't look constitutional to  
21 me"; and then the opponent of the statute says, "Yeah,  
22 that's a good point. You're right, Judge, it's not  
23 constitutional." Well, in that event the judge has sua  
24 sponte raised it, but so does the judge then have to let  
25 the Attorney General know, and I would think that the

1 Attorney General if that's going to get litigated, would  
2 sure want to know about that, if there's a, you know,  
3 comparable state statute that impinges on free speech and  
4 is going to be litigated as to whether or not it's  
5 constitutional.

6 MR. GILSTRAP: You know, judges can raise it  
7 sua sponte, but at some point when that happens, I mean,  
8 isn't one of the litigants going to have to say, "A-ha,  
9 you're right, Judge."

10 CHAIRMAN BABCOCK: Right.

11 MR. GILSTRAP: So, therefore, at that point  
12 that litigant will file a paper questioning the  
13 constitutionality and then the Attorney General can be  
14 notified. I guess there's still some question about  
15 making sure it happens, and if the parties haven't done it  
16 then maybe the judge shouldn't -- should direct them to  
17 say, "Okay, be sure to notify the Attorney General." I  
18 don't really know if that's really enough of an issue to  
19 address in the rule, though.

20 CHAIRMAN BABCOCK: Okay. Yeah, Skip.

21 MR. WATSON: I'm just wondering, and I  
22 apologize if I missed this, but why -- why is it limited  
23 to the filing of a pleading, written motion, or other  
24 paper? I mean, that discussion just brought that out to  
25 me, of what if, you know, in the colloquy on a, you know,

1 JNOV or anything the judge just says, "What about the  
2 constitutionality of the thing," and somebody says, "A-ha,  
3 you're right, you know, I assert that." I mean, it would  
4 appear to me that at that point there should be a burden  
5 to, you know, stop, go no further until the AG is in this.  
6 I'm not sure that would happen, but it drew my attention  
7 that this is pretty narrowly drafted.

8 MR. LOW: But Chip --

9 CHAIRMAN BABCOCK: Yeah, Buddy.

10 MR. LOW: Wouldn't you have to follow with  
11 some motion, say, "Judge, I believe that and I'm going to  
12 file a paper to that effect"? In other words, you would  
13 have to have some pleading or something to support it,  
14 wouldn't you?

15 CHAIRMAN BABCOCK: Richard Munzinger, and  
16 then Justice Bland.

17 MR. MUNZINGER: Well, you know, if a judge  
18 -- you're standing in front of the judge in the example  
19 you give about the election contest, and the judge says,  
20 "Hey, guys, have you fellows thought about whether this  
21 statute is constitutional?" Does that qualify as a court  
22 raising the issue, just that verbal question by the judge?  
23 Suppose the parties say, "Yeah, Judge, we've briefed it,"  
24 or they say, "We don't think it's important." The mere  
25 raising of that question by the judge on the record should

1 not trigger this rule. The judge should be required to do  
2 something more formal than raise the inquiry. He needs to  
3 enter an order or do something else that makes it clear  
4 that the court at least has serious questions with the  
5 constitutionality of whatever it is that's before it.

6 CHAIRMAN BABCOCK: Uh-huh.

7 MR. MUNZINGER: Otherwise, you've got all  
8 kinds of little procedural pitfalls and failures that  
9 people go through. Well, that judge questioned that so  
10 now we're going to raise this on this issue, et cetera,  
11 and while the rule says it doesn't forfeit the rights, I  
12 don't think that it's prudent to just have a judge make a  
13 simple inquiry and trigger the rule. It ought to be  
14 something more formal.

15 CHAIRMAN BABCOCK: Yeah. But a simple  
16 inquiry could be construed as raising the question, right?  
17 That's what the rule says.

18 MR. MUNZINGER: Yes.

19 CHAIRMAN BABCOCK: Justice Bland.

20 HONORABLE JANE BLAND: I have a concern  
21 about that when it's coupled with the comments on the back  
22 page, comment four that says, "Failure of notice under  
23 this rule constitutes reversible error on appeal."  
24 Leaving aside that I don't think Rules of Procedure should  
25 dictate whether or not a case is reversible or not, I can

1 envision a case where somebody, you know, in a kitchen  
2 sink pleading says, "Oh, and by the way, some aspect of  
3 something is unconstitutional." Everybody leaves it  
4 alone; they go on down the road; they have a great big  
5 jury trial; they, you know, get a judgment. Nothing has  
6 been declared unconstitutional. The Attorney General's  
7 office is not interested in the case, but on appeal the  
8 losing party says, "Hey, nobody gave notice to the  
9 Attorney General under this rule," and guess what, it's  
10 reversible -- reversible error on appeal, game over. That  
11 doesn't make any sense to me.

12 CHAIRMAN BABCOCK: Yeah. Judge Evans.

13 HONORABLE DAVID EVANS: Well, I think (b) is  
14 questionable as to whether or not you want to include  
15 that. I realize you take it from Rule 5.1, but the  
16 certification by the court is going to leave the court to  
17 write an advocacy order, a position order, to the Attorney  
18 General. Then the Attorney General intervenes, and the  
19 court is the opponent. If the court raises it in  
20 conference with or even on the record says, "I've heard a  
21 of a constitutional challenge on this item or rule or  
22 regulation," and the parties want to pick it up and follow  
23 it through, then the parties are capable of doing it.  
24 Standing is the area that we're most familiar with of  
25 raising ourselves, but rarely -- is a judge then recused

1 if he writes a certification paper saying "I find this  
2 facially unconstitutional," and all the parties look up  
3 and say, "Boy, is he wacko."

4 CHAIRMAN BABCOCK: Not to his face.

5 HONORABLE DAVID EVANS: That's happened to  
6 me, and so I want to avoid that. It just may be a  
7 difference in the role of state judges versus Federal  
8 judges that you might want to look at.

9 CHAIRMAN BABCOCK: Harvey, did you have your  
10 hand up?

11 HONORABLE HARVEY BROWN: Well, yeah. This  
12 is probably out of turn, but it just occurred to me that  
13 in a lot of answers in state court now you see challenges  
14 to constitutionality of exemplary damages.

15 HONORABLE JANE BLAND: Yes.

16 HONORABLE HARVEY BROWN: And you could  
17 almost have every answer trigger this if it at least is  
18 challenging the constitutionality of the Texas statute  
19 that allows exemplary damages like --

20 CHAIRMAN BABCOCK: Yeah, we talked about  
21 that last time.

22 HONORABLE HARVEY BROWN: Huh?

23 CHAIRMAN BABCOCK: We talked about that in  
24 our --

25 HONORABLE HARVEY BROWN: I'm sorry, I missed

1 the last meeting, so I'll shut up.

2 CHAIRMAN BABCOCK: -- conversations last  
3 time. Carl had his hand up and --

4 MR. HAMILTON: Well, I think that we could  
5 fix that by putting in something like that's actually  
6 litigated. The judge could raise it, but unless it's  
7 litigated and decided then the Attorney General doesn't  
8 need to be notified. If the judge just raises it and it's  
9 not litigated then why bother with anybody.

10 CHAIRMAN BABCOCK: Frank.

11 MR. GILSTRAP: I just want to acknowledge  
12 Justice Bland's comment about reversible error. The -- I  
13 think the purpose of that comment is to actually  
14 ameliorate the effect of the rule because we have all of  
15 these declaratory judgment cases that say the court  
16 doesn't have jurisdiction, which is worse than  
17 reversible error. That really gets, though, into the  
18 question of, you know, what are the consequences of  
19 failing to follow the rule, and I would like to kind of  
20 defer that to the end because it's kind of a bottomless  
21 pit. But I didn't want Justice Bland to think that that  
22 was being ignored.

23 CHAIRMAN BABCOCK: Okay. Any other -- on  
24 this, specifically on this subparagraph (b), certification  
25 by the court, any other comments on that? Skip.

1 MR. WATSON: Just one. I don't know how  
2 this would come up, but I think it should be addressed.  
3 I've had the occasion on appeals where the parties were  
4 fighting over the interpretation of a statute to enforce  
5 the statute should it apply, should it not apply, and an  
6 amicus came in and said, "I'll solve that for you. The  
7 statute is unconstitutional and should be declared  
8 unconstitutional," and it does throw a monkey wrench into  
9 the cogs when that happens. You get into the whole thing  
10 of is that issue before the court and the court of appeals  
11 having to grapple with do we have to address that when the  
12 parties haven't raised it. It would be nice if we could  
13 solve that, but, you know, with a simple wording in this  
14 part that, you know, if it's raised by the court or, you  
15 know, if it's somehow injected by somebody outside the  
16 court somebody ought to get into it, but that may not be a  
17 problem, and it may not be a big enough problem to merit  
18 discussion or being addressed at all. It's just I've had  
19 it happen twice, and it does get your attention.

20 CHAIRMAN BABCOCK: Yeah.

21 HONORABLE TOM GRAY: Well, not only does it  
22 come up by amicus in construing a statute they fortunately  
23 for the first time on -- or unfortunately -- frequently is  
24 the word I was looking for. Frequently on appeal you'll  
25 see the argument made that to construe it as they want you



1 to construe it will make it unconstitutional.

2 MR. WATSON: Yes. That's what happened to  
3 me.

4 HONORABLE TOM GRAY: And so it's actually  
5 the party raises it for the first time on appeal, and then  
6 does that put me at the appellate level on notice?

7 MR. WATSON: Well, I would think that would  
8 be covered by (a), personally. I just don't see that as  
9 necessarily applying only to the district court, but maybe  
10 some would interpret it that it would.

11 MR. LOW: Chip?

12 CHAIRMAN BABCOCK: Buddy.

13 MR. LOW: Wouldn't an intervenor be not a  
14 party but a participant? I mean, any party or participant  
15 in a proceeding, which would be intervenor or could be an  
16 amicus or what. They are a participant but not a party,  
17 and shouldn't an amicus, if they're going to raise that,  
18 shouldn't they then be bound by it just like a party?

19 MR. WATSON: I think so, but I --

20 MR. LOW: Yeah, but if you did that, you'd  
21 have to take care of the first thing, say "a party or  
22 participant files a pleading."

23 CHAIRMAN BABCOCK: Would you say "a party or  
24 an amicus"?

25 MR. LOW: Well, that might take care of it,

1 because -- yeah.

2 CHAIRMAN BABCOCK: Okay. Yeah, Gene.

3 MR. STORIE: I think we should treat the  
4 question of intervention separately from amicus practice,  
5 because during my time it would happen fairly frequently  
6 that a constitutional issue would be raised in district  
7 court, and we would say, "Okay, well, this is not going to  
8 be a published opinion, we may be interested down the  
9 road," so -- in which case we file an amicus brief, as I  
10 have done. Intervening to me is participating as a party,  
11 so you might have discovery, as Bill Dorsaneo asked about  
12 last time.

13 CHAIRMAN BABCOCK: Richard.

14 MR. MUNZINGER: I would be opposed to  
15 amending the rule to suggest that an amicus has the same  
16 standing in litigation as a party. They don't.

17 CHAIRMAN BABCOCK: Yeah.

18 MR. MUNZINGER: And I don't think we want to  
19 establish a rule that says amici can come in and change  
20 the direction of a lawsuit or force people to do things.  
21 Courts I think can prevent people from coming in as amici,  
22 and I sure would not want to say that some amicus brief  
23 can change the course or complexion of a lawsuit, how it's  
24 managed by the court or the parties. I think that's a bad  
25 rule.

1 CHAIRMAN BABCOCK: Yeah, Buddy.

2 MR. LOW: But, Chip, what if you get 10  
3 amicus briefs --

4 MR. MUNZINGER: It's 10 times a bad rule.

5 MR. LOW: -- that raise that question and  
6 they file -- and what? They raise that question, then the  
7 Attorney General wouldn't want to know about that?

8 MR. MUNZINGER: Well, but, again, Buddy,  
9 here you and I are the parties to the lawsuit --

10 MR. LOW: Right.

11 MR. MUNZINGER: -- and all these people file  
12 their amicus briefs. Either you or I can adopt the  
13 position being urged by the parties and certify to the  
14 Attorney General, but I don't think that these people  
15 should have the right to tell you and I how to conduct our  
16 lawsuit and to take the issues to the judge or to the  
17 jury, and if you have a rule that would suggest that, I  
18 think you're causing a problem.

19 MR. LOW: But on appeal I've seen some --  
20 those amici briefs that were more effective than the other  
21 briefs, and the court certainly can listen to them.

22 MR. MUNZINGER: I'm not saying they can't  
23 make their argument. I'm just taking the position against  
24 including an amicus in this rule, which would imply that  
25 the amicus has some right that they don't have otherwise.

1 It could have an effect on the litigation. Leave the  
2 parties to notify the Attorney General or conduct their  
3 own litigation. That's my only point.

4 MR. LOW: I know, but --

5 CHAIRMAN BABCOCK: Skip.

6 MR. WATSON: I concluded that, you know,  
7 obviously the amicus can raise issues or inject issues  
8 into a case that the parties hadn't presented pursuant to  
9 the rules. I mean, that's pretty basic, but I'm trying to  
10 get to the underlying argument that should the AG be  
11 involved if somebody is up there, you know, waving the  
12 unconstitutional flag. I mean, to me that's the issue, at  
13 what point would the AG want to be involved and come in  
14 and say, "No, that's wrong, don't consider it."  
15 Procedurally I think Richard is absolutely correct.

16 CHAIRMAN BABCOCK: Yeah, Pete.

17 MR. SCHENKKAN: I would urge us to loop back  
18 to where Frank started, which is it's enough for now to  
19 deal with the core that this is intended to deal with,  
20 which is when some party in a trial court sets out to hold  
21 the statute -- get a court to hold the statute  
22 unconstitutional, Texas statute unconstitutional, and he  
23 wants the Texas AG to know about it, let's stop there for  
24 now, because we're getting -- we're raising a lot of  
25 complicated issues that cause problems for lots of people

1 when we try to figure out how much farther we can go.  
2 Let's get the good, major, low-hanging fruit picked and  
3 let's see later if we need to come back.

4 CHAIRMAN BABCOCK: Okay. Let's go back to  
5 this subparagraph (b). We ought to take a vote to see how  
6 many people think it should be included as written. So  
7 why don't we do that now unless we have any more comments  
8 about it? Everybody that's in favor of including  
9 subparagraph (b), certification by the court, raise your  
10 hand. Overwhelming show of support.

11 Everybody against? Unanimous against, with  
12 two people abstaining, so that one will bite the dust,  
13 Frank.

14 MR. GILSTRAP: All right.

15 CHAIRMAN BABCOCK: Nice try.

16 MR. GILSTRAP: Okay. I'm not crying. The  
17 next one should wake some people up. And on its face it's  
18 fairly innocuous. (c), intervention. The obvious purpose  
19 of this is to give the Attorney General 60 days to  
20 intervene if he wants to intervene. The judge -- the  
21 court can't decide -- render a final judgment or sign a  
22 final judgment until 60 days have passed from the time  
23 that the Attorney General is notified, you know, and  
24 procedurally the only suggestion I would have would be  
25 maybe some provision that allows the Attorney General to

1 tell the court that they're not going to intervene so that  
2 that would allow the matters to move quickly, but there is  
3 a much larger question here and one we touched on last  
4 time, and that's this: You know, the Attorney General's  
5 right to intervene. I mean, it says that "Unless the  
6 court sets a later time, the Attorney General may  
7 intervene within 60 days after the notice is  
8 filed." Well, so can I. Anybody can intervene.

9           The question is should the Attorney General  
10 have the right to intervene, and I believe the Attorney  
11 General wants the right to intervene, but I don't know  
12 that it's enough just to say that because last time when  
13 we talked about it -- and I think I was the prime  
14 offender -- I was saying that, well, they can intervene  
15 subject to being stricken for good cause. Well, the  
16 problem is the test is not good cause.

17           Not so long ago the Supreme Court handed  
18 down the Union Carbide case that said that for a party to  
19 intervene it must have a justiciable interest, and that  
20 was defined as it has to claim that its rights, the  
21 intervening party's rights, will be affected or resolved  
22 by the resolution of the case in which he's intervening,  
23 and the purpose of that I think was to deal with the mass  
24 tort problem, but it's -- that standard is in a -- is a  
25 standard I don't think the Attorney General can meet. He

1 does not have an interest in the underlying controversy.  
2 Now, you could see that perhaps the courts would make some  
3 kind of a public interest exception to this challenge, but  
4 justiciability is -- that's Article 3, that's  
5 jurisdictional, that's pleas to the jurisdiction, so I  
6 think that's a problem here.

7           The Federal statute -- the Federal statute  
8 solves this problem by saying that when the United States  
9 intervenes -- or the state intervenes in a Federal suit it  
10 shall have all the rights of a party and be subject to all  
11 liabilities of a party to pay court costs -- to pay court  
12 costs. So it gives the Attorney General the rights of a  
13 party, and, you know, we may want to address that here,  
14 because right now, given the test that -- the requirement  
15 of justiciability, I'm not sure where it's going to wind  
16 up.

17           Beyond that is the question of once the  
18 Attorney General intervenes, what can he do? I mean,  
19 suppose he intervenes and says, you know, "I agree this  
20 statute is unconstitutional. I think the plaintiff is  
21 violating the law, and I'm going to sue the plaintiff."  
22 You know, I mean, can -- once the Attorney General is in,  
23 is he in for everything? Well, the Federal statute deals  
24 with that by saying that the Attorney General has the  
25 rights of a party to the extent necessary for a proper

1 presentation of the facts and law relating to the question  
2 of constitutionality. So that's an attempt to limit the  
3 rights of the intervenor. These quotes, by the way, are  
4 from 28 USC section 24.03. So, you know, leaving aside  
5 the timing issue, which I don't think anybody has a  
6 problem with, I don't think, the question is, you know,  
7 does the Attorney General have a right. If so -- or do we  
8 want him to have a right. If so, how do we say that, and  
9 finally, once he intervenes how far can he go? And I  
10 think we touched on those last time, but I think they  
11 could probably require some further examination.

12 CHAIRMAN BABCOCK: Justice Hecht.

13 HONORABLE NATHAN HECHT: And one more issue  
14 is immunity because you wouldn't -- I'm sure the Attorney  
15 General wouldn't want immunity waived by being in the  
16 lawsuit.

17 CHAIRMAN BABCOCK: Yeah. Pete.

18 MR. GILSTRAP: You mean immunity for court  
19 costs? Because that's what the Federal statute says. You  
20 think that would be a problem?

21 HONORABLE NATHAN HECHT: Well, I don't think  
22 it's a problem. I mean, government is not liable for  
23 court costs generally, but there is some law in Texas that  
24 the government waives immunity by voluntarily joining the  
25 lawsuit.



1 MR. GILSTRAP: Ah, yes.

2 HONORABLE NATHAN HECHT: So I'm sure they  
3 wouldn't want that.

4 MR. GILSTRAP: Another issue.

5 CHAIRMAN BABCOCK: Pete.

6 MR. SCHENKKAN: I would suggest the same  
7 solution is appropriate here. Again, we are getting into  
8 deep waters that the Court, I would think, would not want  
9 to try to resolve nor affect by rule that is essentially a  
10 notice rule. It's a question of when the Attorney General  
11 representing the State of Texas with regard to the  
12 constitutionality of a state statute is a party and to  
13 what extent they're a party and to what extent their  
14 choice to intervene and litigate as a party exposes them  
15 to liability they wouldn't otherwise have or anything  
16 else. All of this is way beyond the scope of a notice  
17 rule and not a good thing for us to suggest that the Court  
18 try to take up at this time.

19 The Attorney General may wish to consider  
20 those questions in deciding whether to intervene in any  
21 particular case, and I'm sure they will. I would think,  
22 for instance, that the Uniform Declaratory Judgment Act  
23 provides that the -- that attorney's fees can be shifted  
24 against the losing party, and at least some people believe  
25 that the Supreme Court's Leeper decision holds that it

1 is -- that immunity is waived as to attorney fees in that  
2 case. I recognize that hasn't come back up in the modern  
3 era of immunity litigation, so perhaps that's not a  
4 well-founded one, the meaning of that case, or perhaps  
5 it's no longer the law, but all of those are questions  
6 that it's just not appropriate to address by a notice  
7 rule. We would be better off just doing it the way you've  
8 got it drafted. They've got 60 days or such later time as  
9 the court provides and then we'll see what happens.

10 CHAIRMAN BABCOCK: Harvey.

11 HONORABLE HARVEY BROWN: I had a question,  
12 and that is how does the 60 days work? Let's say somebody  
13 raises a constitutional issue 30 days before trial. Does  
14 that mean the trial is bumped? What if it's a TRO or TI  
15 where somebody is fighting over constitutional rights? I  
16 could see free speech or those type of issues being raised  
17 in a TRO. Does the TRO get bumped? So I'm not sure  
18 that's very clear about what this means.

19 CHAIRMAN BABCOCK: I was thinking about  
20 that, too. Put a different way, does this intervention  
21 rule preclude a judge from granting a TRO based on the  
22 unconstitutionality of a Texas statute?

23 MR. GILSTRAP: It just says "final  
24 judgment," and I think we talked about that last time. It  
25 doesn't stay the lawsuit. It just -- it says that the

1 final judgment can't be entered for 60 days. The idea is  
2 to -- even if a TRO has been entered, that type thing, the  
3 Attorney General can still come in, but once a judgment is  
4 signed, then, you know, there are problems with  
5 intervening even by the Attorney General after a final  
6 judgment is signed.

7 CHAIRMAN BABCOCK: Uh-huh. Okay.

8 MR. GILSTRAP: You know, let me say this,  
9 you know, Pete is -- Pete's Burkean approach is after my  
10 own heart. I mean, I --

11 CHAIRMAN BABCOCK: What kind of approach?

12 MR. GILSTRAP: Burkean, Edmund Burke.

13 CHAIRMAN BABCOCK: Burkean.

14 MR. GILSTRAP: And I like the idea of eating  
15 the apple one bite at a time, although, you know, I'm not  
16 sure that -- I'm a little uneasy about just leaving this  
17 here, because, you know, certainly the Attorney General  
18 believes he has a right to intervene, and it may be that,  
19 okay, Attorney General, you want the rule, here it is, now  
20 go prove you can intervene. But I'm a bit troubled by it  
21 because the purpose -- see, the feds solve the problem by  
22 giving the Attorney General the right to intervene and in  
23 a limited sense act as a party under -- if we leave it  
24 like this I think district judges will be free to say,  
25 "Okay, Attorney General I'm kicking you out," and I'm not

1 sure, given the present state of the law, that there's  
2 anything that the Attorney General can do about it other  
3 than, of course, you know, seek mandamus.

4 CHAIRMAN BABCOCK: Okay. Yeah, Carl.

5 MR. HAMILTON: Isn't the notice given  
6 because the Attorney General is responsible to the state  
7 to uphold the constitutionality of the statute? Isn't  
8 that his justiciable interest? Why does he have to have  
9 another interest?

10 MR. GILSTRAP: The Attorney General,  
11 Solicitor General Ho said last time that, you know, almost  
12 always the state will intervene -- first of all, the state  
13 will usually not intervene. That's the first thing, and  
14 when they do intervene it is almost always to protect the  
15 constitutionality of the statute, but he would not say  
16 that the Attorney General would not under some  
17 circumstances attack the constitutionality of the statute  
18 or join with the person attacking it. I think he wanted  
19 to preserve the autonomy of the Attorney General.

20 MR. HAMILTON: Well, whether he does or he  
21 doesn't, he still has a justiciable interest in the  
22 constitutionality of the statute.

23 MR. GILSTRAP: Well, I don't think he has a  
24 right to the plaintiff's right of recovery, and that's the  
25 way I read Union Carbide. You know, it's not -- you don't

1 have a justiciable interest in the legal issues. You have  
2 a justiciable interest in the claim that the plaintiff is  
3 making. You know, in that case there were two guys, I  
4 believe their names -- Hall and Moffett, and Moffett sued  
5 and said, you know, "I've been working here at this plant,  
6 and I had benzene, and I'm suffering occupational  
7 disease," and Mr. Hall intervened and said "Yeah, I've  
8 been working there, too, and I've been breathing benzene,  
9 and I'm suffering form the same thing," and the Court  
10 said, "No, he did not have a justiciable interest in  
11 Hall's claim because whether or not Hall got money would  
12 not determine whether he got some of that same money." I  
13 mean, that's how I read the case, so it's a pretty narrow  
14 test.

15 CHAIRMAN BABCOCK: Well, but that case, that  
16 was a forum shopping deal, wasn't it?

17 MR. GILSTRAP: Well, yes, but those cases do  
18 have other consequences, you know.

19 CHAIRMAN BABCOCK: I mean, but that's what  
20 the Court was worried about.

21 MR. GILSTRAP: Yes. But when they define  
22 the standard justiciability and say that intervenors have  
23 to meet that standard and justiciability is a  
24 jurisdictional concept, you know, I think some creative  
25 lawyers could do quite a lot with that.

1 CHAIRMAN BABCOCK: Yeah. Okay. Well, any  
2 more comments on sub (c)? Yeah, Carl.

3 MR. HAMILTON: What does the word "reject"  
4 mean? Does that mean overrule?

5 MR. GILSTRAP: Where are you reading, Carl?

6 MR. HAMILTON: It says, "The court may  
7 reject the constitutional challenge, but may not enter a  
8 final judgment holding the statute unconstitutional."

9 MR. GILSTRAP: Well, the idea -- the idea  
10 behind it is that if the judge -- this only applies -- the  
11 60-day limit only applies if the judge is going to hold  
12 the challenge -- the statute unconstitutional. If he  
13 wants to say it's not unconstitutional, he doesn't have to  
14 wait 60 days.

15 MR. HAMILTON: So "reject" means overrule?

16 MR. GILSTRAP: That's right. Deny,  
17 overrule, right.

18 CHAIRMAN BABCOCK: And you don't think that  
19 this is going to mislead judges into thinking they don't  
20 have the ability to grant a TRO or a temporary injunction?

21 MR. GILSTRAP: Well, it says "final  
22 judgment."

23 CHAIRMAN BABCOCK: Okay.

24 MR. LOW: But --

25 CHAIRMAN BABCOCK: Buddy.

1 MR. LOW: That was a question I had. Does  
2 it mean a judge can do everything else that he ordinarily  
3 would do but a final judgment? It doesn't tell him he  
4 can.

5 CHAIRMAN BABCOCK: Right.

6 MR. LOW: And that was a question I raised.  
7 It says, well, it doesn't tell me I can't, but does that  
8 mean I can?

9 CHAIRMAN BABCOCK: Yeah. The way when I  
10 read this -- when I first read this, the implication was  
11 you can't do anything mean to the statute --

12 MR. LOW: Right.

13 CHAIRMAN BABCOCK: -- until 60 days have  
14 passed after the notice.

15 MR. LOW: That's right, and there might be  
16 ordering depositions pertaining to that or ordering -- and  
17 that was the question I had. Maybe -- okay. No more.

18 CHAIRMAN BABCOCK: But Frank's right. It  
19 does say "final judgment."

20 MR. LOW: Well --

21 MR. GILSTRAP: You'd like it --

22 MR. LOW: It doesn't say he can't do it.

23 MR. GILSTRAP: You'd like it clearer.

24 MR. LOW: Well, I'm not so sure. I don't  
25 know how you can -- I don't have the language. That was

1 the question I raised, and then you say, well, it means  
2 what it says, so therefore, a judge is not prevented --  
3 nothing in here prevents him from doing all of those  
4 things, but can he grant temporary orders or -- it doesn't  
5 say he can't.

6 CHAIRMAN BABCOCK: Yeah. Yeah. Richard.

7 MR. MUNZINGER: Isn't all of this discussion  
8 avoided if the vote is whether or not to include  
9 subsection (c), given Pete's comments that all of this is  
10 overkill and creating problems? Maybe if we vote not to  
11 include that section we finesse all of these issues.

12 CHAIRMAN BABCOCK: Yeah, that's a good  
13 point. Frank is amused by it.

14 MR. GILSTRAP: Well, no, no, I'm not.  
15 There's some wisdom in that. You know, again, what  
16 problems are we trying to avoid? Are we trying to avoid  
17 the -- you know, whether or not the Attorney General has  
18 the right to intervene, which is one problem, or are we  
19 trying to avoid the problem of once the Attorney General  
20 intervenes how far can he go, which are two different  
21 things?

22 CHAIRMAN BABCOCK: Well, fortunately Justice  
23 Peeples is here to solve that problem. Carl.

24 MR. HAMILTON: Well, I think the problem  
25 we're trying to solve is what can the court do until the



1 Attorney General intervenes or doesn't intervene.

2 MR. GILSTRAP: That's the problem Buddy was  
3 talking about.

4 MR. HAMILTON: Yeah.

5 CHAIRMAN BABCOCK: Right.

6 MR. GILSTRAP: Well, I think the clear -- I  
7 wanted to say clear intent, but apparently it's not clear.  
8 The intent was he can do everything except sign a final  
9 judgment, the idea being that the Attorney General can  
10 always get there before the final judgment, but he can't  
11 get there after the final judgment. That's the purpose.  
12 Now, you know, apparently it's not stated that clearly.

13 MR. LOW: But this gives the Attorney  
14 General a specific time about intervention and just  
15 general right to intervene under -- just like anybody else  
16 can intervene subject to leave of court and so forth.  
17 Doesn't say when, where, or what, and he has to get leave.  
18 This gives him the specific right to intervene within --  
19 and tells the time limit.

20 MR. GILSTRAP: Well, now, he's already  
21 got the -- he's already got the right to intervene under  
22 Rule 60 because, you know, I can intervene.

23 MR. LOW: Well, I know, but do you have to  
24 get leave to intervene?

25 MR. GILSTRAP: No. Not -- in Federal court

1 you do, but not in state court.

2 MR. LOW: Okay.

3 MR. MUNZINGER: But you can be stricken in  
4 state court.

5 CHAIRMAN BABCOCK: Yeah, you can get kicked  
6 out.

7 MR. MUNZINGER: You still have to raise the  
8 issue of whether you have the right to intervene.

9 CHAIRMAN BABCOCK: Pete, you have a comment,  
10 but only if it's Burkean.

11 MR. SCHENKKAN: Well, I really think it is.  
12 I didn't mean even to go so far as to suggest that we  
13 should strike (c). I just meant we shouldn't reword (c)  
14 to go past it. I was reading (c) as just saying you've  
15 got 60 days to exercise whatever rights you have to  
16 intervene, if any, and it has whatever consequences it  
17 has, if any, and you better do your own legal work before  
18 you do it and see if you're willing to run those risks. I  
19 didn't mean to say we shouldn't have a time notice for  
20 this. I do think that's a good idea, and I believe that  
21 as to the implications of saying it the way we've said it  
22 -- the way that the proposed rule says it, "may  
23 intervene," that doesn't create a right because, as you  
24 say, the right already exists. It's under Rule 60, and  
25 the way it works under Rule 60, as I've always understood

1 it, is anybody can file the piece of paper.

2 CHAIRMAN BABCOCK: Right.

3 MR. SCHENKKAN: And then somebody else gets  
4 to say, "I move to strike, and here are the reasons it  
5 should be stricken," and if those reasons are good, you're  
6 out, but you can file the intervention, and I thought  
7 that's all we were doing, is saying you've got 60 days to  
8 file that intervention.

9 MR. GILSTRAP: Let me respond to that.

10 MR. LOW: Chip --

11 CHAIRMAN BABCOCK: Buddy --

12 MR. LOW: -- it looks like we would be  
13 voting --

14 CHAIRMAN BABCOCK: And then you can respond.

15 MR. LOW: -- whether or not to leave (c) as  
16 it is or add language making it clear they could do other  
17 things, unless somebody wants to vote just totally to  
18 strike it, and Pete's not suggesting that, so it would be  
19 a vote between those two, leaving it that or making it  
20 clearer that they can do other things like temporary  
21 injunction.

22 CHAIRMAN BABCOCK: Yeah. Go ahead, Frank,  
23 and then Alistair and somebody else.

24 MR. GILSTRAP: In response to Pete's comment  
25 and I think this may also talk to Buddy's comment, the way

1 we originally drafted the thing was we merely said, "A  
2 court may not enter a final judgment holding a statute  
3 unconstitutional until 60 days have expired after serving  
4 the notice." I think the Attorney General expressed some  
5 concern about, well, you know, it needs to say something  
6 about intervening; but, you know, since you have the right  
7 to intervene, since the Attorney General has the right to  
8 intervene, then, you know, the minimalist way to do it was  
9 just say that you can't sign a final judgment until 60  
10 days have expired. We put in this additional language in  
11 an attempt to kind of put this, you know -- to give a  
12 little bit more beef to the Attorney General's role in  
13 this thing, because what is going to happen in that 60  
14 days is the intervention if the Attorney General wants to  
15 intervene, so we thought we would say it.

16 CHAIRMAN BABCOCK: Alistair.

17 MR. DAWSON: Yeah, and I was going to  
18 suggest we go back to the original language and just say,  
19 you know, scrap the whole issue about the Attorney General  
20 intervening because it creates a bunch of issues that are  
21 unnecessary in my judgment. The Attorney General has the  
22 right, and why not just say that the court can't enter  
23 final judgment until 60 days after the notice is provided  
24 and leave it at that. Don't need anything else.

25 CHAIRMAN BABCOCK: Okay. Justice

1 Christopher, then Gene.

2 HONORABLE TRACY CHRISTOPHER: I agree. I  
3 also think that the way that it's written it seems to  
4 limit their right to intervene to the 60 days, which I  
5 would think we wouldn't want to limit their right to  
6 intervene.

7 CHAIRMAN BABCOCK: Gene, then Judge Evans.

8 MR. STORIE: My thought was that this is  
9 creating a statutory right like the Declaratory Judgments  
10 Act, so it would allow an intervention, and that the  
11 intervention participation as a party could be helpful  
12 because you may need some factual development.

13 CHAIRMAN BABCOCK: Judge Evans.

14 HONORABLE DAVID EVANS: Well, it's a  
15 difficult problem, but -- and I've vacillated on it, but  
16 it could be that while the 60 days notice is out the court  
17 receives an order of dismissal settling the case, in which  
18 constitutionality is not going to be invoked, and I'd like  
19 to be able to sign it and throw it -- get it all packed up  
20 into the records section without the AG weighing in on one  
21 party's side or the other.

22 HONORABLE TOM GRAY: Under the rule you  
23 could because you're not declaring it unconstitutional.

24 HONORABLE DAVID EVANS: Well, under this I  
25 could, but there was some discussion over here that was

1 worrying me about where we might end up, and an order --  
2 unless you want to say an order of dismissal, you couldn't  
3 enter a final judgment except for an agreed upon order of  
4 dismissal not involving constitutionality. I mean, I  
5 don't know how you worm around that, but I wonder if  
6 you're going to see any interventions that are really  
7 going to present this problem of 60 days except for -- or  
8 any judgments that are going to present this problem  
9 except for settlement orders. You could have the plea of  
10 unconstitutionality, the notice go out, parties get  
11 together, resolved the case, say, "We don't want the AG in  
12 this" and settle the case and sign the order.

13 I hope none of these come up during trial,  
14 because it will be a nightmare for administration of a  
15 jury trial if you have that occur, so those are a couple  
16 of thoughts that I've -- I'm sorry I missed the last  
17 meeting, but --

18 CHAIRMAN BABCOCK: Yeah, Frank.

19 MR. GILSTRAP: Well, you know, under the  
20 current draft you could certainly do that if the  
21 settlement is -- the term of the settlement is that the  
22 Constitution is not -- the statute is not  
23 unconstitutional. The problem comes if you have a  
24 settlement in the nature of, say, a consent order, that  
25 type thing that the Feds do where the defendant agrees

1 that it is unconstitutional. In fact, he has been  
2 violating the Constitution, and they settle it that way.  
3 There I think you would want the Attorney General -- the  
4 Attorney General would want to come in and would want to  
5 have the right to look at that since there is a judgment,  
6 albeit agreed that says a state statute is  
7 unconstitutional.

8 HONORABLE DAVID EVANS: I think that what I  
9 was trying to point out, you have to have some authority  
10 to sign the order that doesn't involve the  
11 constitutionality of the statute, and if you remove that  
12 portion about it you're going to run into a problem with  
13 the trial judge in the administration because the case can  
14 settle. This phrasing is fine with me. I just hope that  
15 we don't have such late filed motions that you're in the  
16 middle of trial, a trial judge has to decide that he's  
17 going to abate the case and intervene. It would be nice  
18 if this notice has got to be at least 60 days -- I don't  
19 know how it triggers with the other pleading rules. I  
20 would get one seven days before a specially set case and  
21 be abating the lawsuit. I won't start a lawsuit if the AG  
22 is going to be a potential party. That's just mechanics.

23 CHAIRMAN BABCOCK: Pete.

24 MR. SCHENKKAN: I think if we amended the  
25 (c) to read "Until 60 days after the notice is filed, the

1 court may not enter a final judgment holding the statute  
2 unconstitutional," we've done all we need to do, and I  
3 don't see the settlement issue as causing a problem --

4 HONORABLE DAVID EVANS: The problem there --

5 MR. SCHENKKAN: -- for it because I would  
6 have thought that if the settlement included a provision  
7 holding a statute unconstitutional, one, why would you do  
8 that? Why would you draft your settlement that way? Two,  
9 especially why would you draft your settlement that way if  
10 you knew that it would expose you to having it overturned  
11 by an intervention by the Attorney General within plenary  
12 jurisdiction time or attacked collaterally or, you know,  
13 just seems like an imprudent thing to do; and to whatever  
14 small extent there may be a risk of that type, again, I  
15 think this is good enough for now. Let's cross that  
16 particular, it seems to me, pretty unlikely bridge when we  
17 get to it and not try to do it by rule, which creates all  
18 these collateral consequences.

19 CHAIRMAN BABCOCK: Richard.

20 MR. MUNZINGER: Not all settlements are done  
21 by a simple order of dismissal with prejudice. Sometimes  
22 settlements require that a take-nothing judgment be  
23 entered, for example, and claims preclusion principles  
24 would apply at least to the parties to the litigation --

25 CHAIRMAN BABCOCK: Right.



1 MR. MUNZINGER: -- in that kind of a case,  
2 or they should, and the case law says that they do. I  
3 don't know that such a judgment were it to be entered  
4 would preclude and shouldn't preclude the state, but you  
5 may want to give some thought to that that they're -- not  
6 all settlement orders are just a simple dismissal with  
7 prejudice. A judgment denying relief is a judgment on the  
8 merits, whether it's settled or not, and if it's a final  
9 judgment, claims preclusion applies.

10 CHAIRMAN BABCOCK: Okay. Yeah, Judge  
11 Yelenosky.

12 HONORABLE STEPHEN YELENOSKY: I just have a  
13 question. Is the "may intervene" language in this  
14 intended to override the possibility that the intervention  
15 would be struck? Is it a right to intervene and not be  
16 struck?

17 MR. GILSTRAP: It says "may."

18 HONORABLE STEPHEN YELENOSKY: But it says  
19 "may intervene," which leaves open the question in my mind  
20 does that mean the trial judge has no authority to strike  
21 under any circumstance?

22 MR. GILSTRAP: Well, that was kind of the  
23 larger question that I think I raised at the beginning.

24 CHAIRMAN BABCOCK: Yeah. And the answer is  
25 there is that possibility of reading it this way, that

1 way.

2 HONORABLE STEPHEN YELENOSKY: Okay. Is that  
3 intended?

4 MR. GILSTRAP: I don't know what Richard  
5 intended.

6 HONORABLE STEPHEN YELENOSKY: Oh.

7 CHAIRMAN BABCOCK: I don't think we took a  
8 vote on our intentions on that particular point. Gene.

9 MR. STORIE: I think the intent was that the  
10 Attorney General did not have to intervene every time  
11 constitutionality was raised.

12 HONORABLE STEPHEN YELENOSKY: No, but my  
13 question is suppose they intervene and suppose some party  
14 raises a basis for striking the intervention. Would this  
15 change the current law, which allows the court under some  
16 circumstances to strike an intervention?

17 HONORABLE DAVID EVANS: Well, you want to  
18 put it in "may intervene pursuant to," cite the rule on  
19 intervention which allows a motion to strike? I was just  
20 thinking that if a judge struck the intervention he's  
21 making a ruling that it's constitutional, and --

22 HONORABLE STEPHEN YELENOSKY: Well, I can't  
23 imagine all the base -- I guess at this point I just have  
24 a question, because I know in a recent case intervention  
25 was struck, but it wasn't pursuant to this rule and had to

1 do with the timing in the intervention, and so I just have  
2 the question at this point, and if it doesn't concern  
3 anybody, then fine, but I don't understand whether the  
4 intent is to do that or not.

5 CHAIRMAN BABCOCK: Pete, and then Carl.

6 MR. SCHENKKAN: I thought that was the point  
7 of our earlier discussion, that we did not want this rule  
8 read as creating or limiting whatever existing rules there  
9 were as to intervention, with 60 being the one that I'm  
10 familiar with, and thus it didn't give the Attorney  
11 General any right he didn't already have and it didn't  
12 deprive anybody of any right they may have to move to  
13 strike an intervention.

14 HONORABLE STEPHEN YELENOSKY: Well, then my  
15 only input is it's not clear.

16 MR. SCHENKKAN: Well, as the "may" is not,  
17 but that's why I thought we were headed in the direction  
18 instead of changing the wording of (c) to read in full,  
19 "Until 60 days after the notice is filed the court may not  
20 enter a final judgment holding the statute  
21 unconstitutional."

22 HONORABLE STEPHEN YELENOSKY: And just avoid  
23 the problem.

24 MR. SCHENKKAN: Just avoid the problem  
25 entirely and leave everybody, starting with the Attorney

1 General, to figure out what they want to do during this 60  
2 days, whether they want to intervene. If they do,  
3 somebody else gets to figure out if they want to move to  
4 strike or if they want to take advantage of the Attorney  
5 General's arrival to say that the state has waived its  
6 immunity from some claim. You know, all we want out of  
7 this rule is notice, and the only point of (c) is for that  
8 notice to be effective to not let a final judgment cause a  
9 problem, and if we just reword it that way I think we've  
10 done, again -- I don't know whether this is Burkean or  
11 Occam, Occam's razor, limit it to what we want.

12 CHAIRMAN BABCOCK: Yeah, Carl.

13 MR. HAMILTON: I thought it was the other  
14 way around. I thought we were trying to pattern this  
15 after the Federal rule, which allows -- says the court  
16 shall permit the Attorney General to intervene for the  
17 presentation of evidence, so forth, and I thought we were  
18 trying to pattern this so that the Attorney General had a  
19 right to intervene if he wanted to and couldn't be struck  
20 for other reason.

21 CHAIRMAN BABCOCK: Buddy.

22 MR. LOW: Frank, did you have discussions  
23 about -- I mean, we can -- somebody wants to delay the  
24 trial or delay, and they wait until 10 days, say, before  
25 and they file this answer, but if you go to the last

1 sentence, it doesn't matter. You can have a trial; you  
2 can do what you want to. You just can't declare it  
3 unconstitutional, and the Attorney General is not going to  
4 really worry about the facts so much. It's going to be  
5 the legal point of whether that is, in fact,  
6 unconstitutional. Did y'all have a discussion about how  
7 it may be used as delay the way it's written?

8 MR. GILSTRAP: Well, the only thing -- the  
9 way it's intended to be written is the only thing that can  
10 be delayed is the final judgment.

11 MR. LOW: I understand.

12 MR. GILSTRAP: You can't delay the trial.  
13 You can't delay the temporary injunction, that type of  
14 thing, and I think the idea is that there is a tradeoff  
15 here. The Attorney General needs to be able to come and  
16 know about these suits, and if he's not told until the  
17 case is about to go to trial, he should have the right to  
18 come in and intervene to protect the statute.

19 CHAIRMAN BABCOCK: Any other comments?  
20 Pete.

21 MR. SCHENKKAN: Just response to Carl. I  
22 mean, I thought we were not trying to do what the Federal  
23 rule does, and the Federal rule has the advantage or the  
24 liability of coming out of a Federal statute, which, you  
25 know, is at least less constitutional question about the

1 U.S. Congress' ability to define the rights of the United  
2 States Attorney General than there is about the Texas  
3 Supreme Court's power by rule-making to define in large --  
4 or limit the rights of the Attorney General of Texas, and  
5 so, Carl, I really did understand it not to be an effort  
6 to -- through a procedural notice rule to get into trying  
7 to write what the rights of the Attorney General of Texas  
8 are or aren't in these. It's just to give him a chance,  
9 just make sure he gets notice and a chance to decide if he  
10 wants to play.

11 CHAIRMAN BABCOCK: Frank.

12 MR. GILSTRAP: I've certainly come to the  
13 conclusion that (c) as written is confusing and we need --  
14 we either need to go toward Pete's approach, which is  
15 Burkean because it's gradus and Occam -- based on Occam  
16 because it's minimal, or we need to take the revolutionary  
17 approach that's in the Federal rules, which gives the  
18 Attorney General the right to intervene, and he can't be  
19 thrown out as long as he's there merely defending the  
20 statute. But I think we need to decide between those two  
21 approaches. There may be somewhat in between, but we  
22 tried to navigate the waters in between and we wound up  
23 shipwrecked on the rocks of uncertainty.

24 CHAIRMAN BABCOCK: You know, I, for one,  
25 love it when you and Pete talk dirty like that. Skip.

1 MR. WATSON: I would like to just vote on  
2 Pete's proposal. I think it solves a lot of this.

3 CHAIRMAN BABCOCK: That makes some sense to  
4 me. Pete, you want to say the proposal?

5 MR. SCHENKKAN: My proposal would be that  
6 (c) read in full -- the title would be "Final decision on  
7 the merits." We wouldn't even put in the word  
8 "intervention" in the title. Then the text would be  
9 "Until 60 days after the notice is filed," comma, "the  
10 court may not enter a final judgment holding the statute  
11 unconstitutional."

12 CHAIRMAN BABCOCK: Okay.

13 MR. BOYD: Can I suggest a friendly  
14 amendment or at least raise the question, is it filed or  
15 served on the Attorney General? "60 days after it's been  
16 served"? The rule requires that the party do both, file  
17 and serve --

18 MR. SCHENKKAN: Yes.

19 MR. BOYD: -- and it seems to me that served  
20 is --

21 HONORABLE STEPHEN YELENOSKY: Does it  
22 require the court to do it when it's raised sua sponte?

23 MR. SCHENKKAN: We voted the sua sponte out  
24 of here shortly before you -- yeah, I'm inclined to accept  
25 that friendly amendment since the whole point is we want

1 the Attorney General to know about it.

2 CHAIRMAN BABCOCK: Okay, read it again with  
3 that friendly amendment.

4 MR. SCHENKKAN: "Until 60 days after the  
5 notice is served on the Attorney General, the court may  
6 not enter a final judgment holding the statute  
7 unconstitutional."

8 CHAIRMAN BABCOCK: Okay. Carl.

9 MR. HAMILTON: I'm still troubled by the  
10 fact that if the Attorney General comes in on the 55th day  
11 or before 60 days and we've had a trial, all of which may  
12 be undone if the Attorney General comes in and the  
13 statute's held unconstitutional, so why are we going on  
14 with this trial and anything else the court wants to do  
15 until all the parties get before the court? It troubles  
16 me that we're allowing these trials and things to go on  
17 even though the Attorney General is not there and  
18 everything may be undone later on.

19 HONORABLE STEPHEN YELENOSKY: Is that  
20 actually happening? I mean, is that the problem?

21 MR. HAMILTON: Huh?

22 HONORABLE STEPHEN YELENOSKY: Is that the  
23 problem, or is it just lack of notice?

24 CHAIRMAN BABCOCK: Buddy.

25 MR. LOW: And if the court is really



1 concerned and it looks like a pretty good issue, the court  
2 is probably -- you have a right to delay and you just have  
3 to judge that; and the parties, if they're concerned about  
4 it, they say, "Well, we don't want to waste our time,"  
5 they can ask for a continuance, but I don't think you can  
6 be fairer than what Pete has suggested.

7                   CHAIRMAN BABCOCK: Yeah. Pete, let's read  
8 it one more time before we vote on it. We're going to  
9 strike "intervention" in the title, so (c) is going to be  
10 called "Final decision on the merits," and it will read  
11 "Until 60 days after the notice is served on the Attorney  
12 General, a court may not enter a final judgment holding a  
13 statute unconstitutional." Everybody in favor of that  
14 raise your hand.

15                   Everybody against? 21 in favor, 1 against,  
16 the Chair not voting. So, Pete, you have Occamed your  
17 Burkean to victory here.

18                   MR. SCHENKKAN: I really need to commemorate  
19 this. Burkean and Occam on one day.

20                   CHAIRMAN BABCOCK: I think a trophy is going  
21 to be prepared.

22                   MR. SCHENKKAN: At least a certificate  
23 signed by you.

24                   HONORABLE TOM GRAY: I want to explain why I  
25 abstained, and it's a little bit related to what Carl

1 raised, and it's not that -- the problem that I see is  
2 this late-filed constitutional challenge, maybe even  
3 post-verdict. One side or the other has lost, and  
4 suddenly they find a constitutional challenge and in a  
5 post-verdict motion make the challenge, and they have  
6 automatically engaged a 60-day extension or at least  
7 triggered the possibility thereof. That really troubles  
8 me, and I would like to see in the final version that the  
9 rule -- the Supreme Court might adopt is that before they  
10 get that 60 days -- or that 60 days doesn't get invoked if  
11 the trial has been had or it's within the 45 days of the  
12 notice of the first trial or something. I mean, just some  
13 caution in just giving them that 60-day almost to blot out  
14 and delay the trial court's ability to enter a judgment.  
15 That concerns me a lot.

16 CHAIRMAN BABCOCK: Judge Yelenosky.

17 HONORABLE STEPHEN YELENOSKY: But they only  
18 get that if the court is thinking about holding it  
19 unconstitutional, so if it's just a frivolous attempt to  
20 get 60 days, the court just denies it.

21 HONORABLE TOM GRAY: Yeah, I hear what  
22 you're saying, but I also understand that sometimes a --  
23 it just gets thrown in there at the last minute, and they  
24 don't know what to do with it, and --

25 HONORABLE STEPHEN YELENOSKY: The court

1 doesn't know what to do with it?

2 HONORABLE TOM GRAY: Yeah, and I'd rather  
3 see the --

4 HONORABLE STEPHEN YELENOSKY: Well, I guess  
5 that's the court's problem. I mean, if it's frivolous it  
6 seems to me the court isn't held up.

7 CHAIRMAN BABCOCK: Kennon.

8 MS. PETERSON: Somebody made a suggestion  
9 earlier that seemed good to me, in that if the AG says,  
10 "I'm not interested" before that 60-day period expires the  
11 court can go forward and do anything the court wants to do  
12 and has jurisdiction to do. It seems like that might be a  
13 good addition in terms of facilitating efficiency when  
14 possible.

15 CHAIRMAN BABCOCK: Yeah. It's not going to  
16 solve Justice Gray's problem, though.

17 MS. PETERSON: No. No. It won't solve  
18 that.

19 HONORABLE TOM GRAY: But it could. It  
20 certainly could be at least one tool --

21 CHAIRMAN BABCOCK: Right.

22 HONORABLE TOM GRAY: -- available that the  
23 AG could say we're not interested in contesting that and  
24 that terminates the time period.

25 CHAIRMAN BABCOCK: And that's that, yeah.

1 HONORABLE TOM GRAY: But it would be only  
2 one tool, and, I mean, attorney Ho was not concerned about  
3 the number of these that they got. He thought that they  
4 would be able to handle them fairly expeditiously, and so  
5 I don't know, it just -- that concerned me the more I --  
6 after Carl talked about some of that delay. I could see  
7 in some situations a trial court using that as an  
8 opportunity to hold it up for whatever reason.

9 CHAIRMAN BABCOCK: Well, one of the  
10 litigants, the losing litigant might, you know, say, "Ho,  
11 I got a chance to stretch this thing out 60 days," just,  
12 you know --

13 HONORABLE TOM GRAY: To try to coerce a  
14 settlement, something.

15 CHAIRMAN BABCOCK: Yeah, whatever.

16 HONORABLE TOM GRAY: Whatever, you know.

17 CHAIRMAN BABCOCK: Judge Yelenosky.

18 HONORABLE STEPHEN YELENOSKY: Well, but if  
19 the judge has an improper motive that could happen, but if  
20 the judge's motive is, well, this might be a good  
21 constitutional challenge, then it's appropriate to delay  
22 it 60 days and get the AG in there. So the only  
23 circumstance under which it would be inappropriate is  
24 party files a frivolous basis constitutional challenge  
25 post-verdict and the judge wants to help them out, and you

1 know, again, if we're starting to write rules for that  
2 kind of judge, then --

3 HONORABLE TOM GRAY: That's all we write  
4 rules for.

5 HONORABLE STEPHEN YELENOSKY: Well, maybe  
6 that's true.

7 CHAIRMAN BABCOCK: Buddy.

8 MR. LOW: But also can you imagine a statute  
9 being declared -- that the Legislature had passed --  
10 declared unconstitutional and the Attorney General say,  
11 "That's all right, I'm not interested in that." Is that  
12 going to happen? I doubt.

13 CHAIRMAN BABCOCK: Yeah. Anybody else?  
14 Justice Sullivan, you used to be in the Attorney General's  
15 office.

16 HONORABLE KENT SULLIVAN: That was somebody  
17 who just looked a lot like me.

18 CHAIRMAN BABCOCK: Okay. What -- Frank,  
19 there is a whole bunch of comments here.

20 MR. GILSTRAP: Let me say this. I would  
21 prefer, I think, to use the remaining time we have -- and  
22 it may only be a half hour -- to talk about Justice  
23 Bland's comment, which was about interpretive commentary  
24 No. 4, and that is what happens if the statute is not  
25 complied with. The problem is that the Declaratory

1 Judgment Act, which has a similar provision that applies  
2 in the declaratory judgment actions, there is a raft of  
3 cases in which the courts have said, "This is  
4 jurisdictional, you didn't give notice to the Attorney  
5 General and your case is over. It's dismissed for lack of  
6 jurisdiction," which raises all sorts of problems, such as  
7 collateral attack, that type of thing. It could be raised  
8 at any time, even on appeal.

9 I think Richard's comment was at least an  
10 attempt to try to say that there would be a different rule  
11 here, and that is, it's not a question of jurisdiction.  
12 The only penalty is the person advocating the  
13 unconstitutionality of the statute loses on that issue,  
14 which is a whole lot different than saying that the court  
15 has no jurisdiction. You know, I guess this opens up the  
16 whole question of what should the penalty be. I mean, you  
17 could argue there shouldn't be any penalty. I mean, the  
18 statute is merely, as Richard says, hortatory. It wants  
19 something to be done, but the fact that it's not done  
20 shouldn't have any consequences, or is the fact that it's  
21 not done, does it result in the plaintiff losing or does  
22 it result in the plaintiff -- the court saying you don't  
23 have jurisdiction at all. But I don't think this is a  
24 question we can necessarily push till later, because given  
25 the rulings on the declaratory judgment statute we might

1 want to say something in the rule.

2 Now, one more question, one more issue. Can  
3 we do something by the rule when the courts have said it's  
4 jurisdictional. I think everybody was uneasy about that  
5 last time, except for Professor Dorsaneo, who said, yeah,  
6 under the Court's rule-making power you can do that. So  
7 that's the issue.

8 CHAIRMAN BABCOCK: Well, when you say,  
9 Frank, that the party advocating unconstitutionality loses  
10 on appeal, does that mean that the court of appeals says  
11 it is constitutional, just because he failed to give  
12 notice?

13 MR. GILSTRAP: No. It -- I believe, I don't  
14 know, because the courts haven't done this, so I'm kind of  
15 guessing, I believe the court would say the plaintiff's  
16 claim to have the statute declared unconstitutional --  
17 unconstitutional is denied because you didn't give notice,  
18 not because it's constitutional.

19 HONORABLE STEPHEN YELENOSKY: And then is it  
20 remanded?

21 CHAIRMAN BABCOCK: Yeah, is it remanded?

22 HONORABLE STEPHEN YELENOSKY: Is it remanded  
23 and given the 60 days? That seems to me the appropriate  
24 solution, because all that was required was to wait 60  
25 days.

1 CHAIRMAN BABCOCK: Yeah.

2 MR. GILSTRAP: You're asking the wrong guy.  
3 I don't know.

4 HONORABLE STEPHEN YELENOSKY: Well, can we  
5 write it to say that?

6 PROFESSOR HOFFMAN: It seems to say that in  
7 the second sentence of note four.

8 MR. GILSTRAP: Yes, it does.

9 CHAIRMAN BABCOCK: Uh-huh. Yeah, Pete.

10 MR. SCHENKKAN: It does say that in note  
11 four, but I'm against note four on Burkean and Occamarian  
12 or whatever the form of Occam is, same principles, because  
13 that then gets you into the question of what is the  
14 effect, and that is what provokes the assertion that  
15 failure of notice constitutes reversible error, and I'm  
16 not so sure it is, and I think that the real answer is it  
17 depends, and I think in some instances the consequences of  
18 this might be pretty severe. In other instances they  
19 might not ought to be severe at all, and I don't think  
20 we're smart enough to figure out in advance what the rule  
21 is that would get it right or even close to right in all  
22 cases.

23 And so, again, I think the best thing to do  
24 is not have note four, to have a rule that is a pure  
25 notice rule, that says the parties have to do this and



1 they have to serve the notice and the final judgment can't  
2 be entered until 60 days after the notice has been served  
3 unless the Attorney General in that 60 days says, "Don't  
4 let me slow things down" and put off the question for a  
5 proper case of what are the consequences of somebody who  
6 hasn't complied; and I think that serves Richard's goal,  
7 as you say; of kind of encouraging people to do this,  
8 because the very uncertainty, well, I don't know what the  
9 consequences are, but it might mess up my case, my trial,  
10 or my settlement or something, maybe I better go ahead and  
11 give this notice; and if I'm the judge, maybe I better not  
12 enter that final judgment until the 60th day has run or  
13 until I hear from the Attorney General, is the whole point  
14 of the thing; and I think we're better off, again, just  
15 cleanly stopping with the words of the rule and not having  
16 note four.

17 CHAIRMAN BABCOCK: Justice Bland, and then  
18 Richard Munzinger.

19 HONORABLE JANE BLAND: I agree with Pete,  
20 and I know there are cases out there that talk about this  
21 stuff being jurisdictional, but I also know that there was  
22 a reversal of the trend toward calling things  
23 jurisdictional a few years back when the Texas Supreme  
24 Court overruled a case and said, you know, we're not going  
25 to presume that a statute or rule is jurisdictional unless

1 there is some indicia that --

2 HONORABLE TOM GRAY: Dubai is the case.

3 HONORABLE JANE BLAND: Dubai, Kazi, yeah, so  
4 thank you. So those cases may be out there, but I don't  
5 think they'd necessarily be applicable here where, you  
6 know, we're talking about a Rule of Civil Procedure that  
7 has no indicia in it if we remove this comment for lack  
8 of -- like I propose that we remove it, that this is a  
9 jurisdictional type of notice; and as far as it not having  
10 any teeth, we have lots of rules that don't have tons of  
11 teeth and get waived; and my big problem is elevating this  
12 particular thing that lawyers need to do to  
13 reversible error without any context is problematic. It  
14 is a huge waste of judicial resources if it turns out that  
15 whether or not the particular statute was unconstitutional  
16 didn't even -- even factor in the trial or the ultimate  
17 judgment, but somebody then waives this around and says,  
18 "Well, we need to do it all over again, because we didn't  
19 send a notice." That doesn't seem very efficient.

20 CHAIRMAN BABCOCK: Munzinger, Buddy, and  
21 then Frank.

22 MR. MUNZINGER: I would only be repeating  
23 what they said. I don't want to waste the time.

24 CHAIRMAN BABCOCK: Buddy.

25 MR. LOW: Frank, did you consider putting

1 that a failure to give notice result is the issue is not  
2 properly before the court for consideration? Not  
3 jurisdictional, but that it's just like you didn't plead  
4 something, and therefore, it can't be declared  
5 unconstitutional because it wasn't properly before the  
6 court.

7                   MR. GILSTRAP: Well, that -- that might be a  
8 way to do it, Buddy. The problem is what I'm hearing over  
9 here to my right is that, you know, the idea that we're  
10 just not going to address this, and I'm not comfortable  
11 with that, because if we were writing on a clean slate it  
12 would be one thing, but we've got -- I mean, I was shocked  
13 at the number of cases under the declaratory judgment  
14 statute that say failure to give notice is jurisdictional,  
15 we're dismissing the case; and, yes, maybe that notion is  
16 in disfavor, but I promise you this, when you raise a  
17 question of constitutionality you become a disfavored  
18 litigant in a lot of courts; and there are plenty of  
19 courts out there that are going to jump at the chance to  
20 dismiss the case for lack of jurisdiction. It's such a  
21 quick and easy fix, and the cases say you can do it.

22                   HONORABLE STEPHEN YELENOSKY: Well, under  
23 the Declaratory Judgment Act. I mean, that's a statutory  
24 claim.

25                   MR. GILSTRAP: What's that?

1 HONORABLE STEPHEN YELENOSKY: It's a  
2 statutory claim, and so they can do what they want with  
3 it, but I'm not sure it becomes jurisdictional on a  
4 straightforward constitutional claim.

5 MR. GILSTRAP: Well, whether it's  
6 jurisdictional -- the point is there are plenty of cases  
7 that say it's jurisdictional, and I'm saying the courts  
8 are going to pour a lot of litigants out using that. Now,  
9 it may be that we trust through the judicial process and  
10 the 14 courts of appeals and the Supreme Court will sort  
11 it all out some day and say it's not jurisdictional, but  
12 in the meantime, you know, it seems to me maybe that we  
13 can short-circuit that by addressing the problem or having  
14 the Court address the problem here and now by rule.

15 CHAIRMAN BABCOCK: Judge Evans -- Justice  
16 Hecht first before Judge Evans.

17 HONORABLE DAVID EVANS: Frank, how many --

18 CHAIRMAN BABCOCK: Or maybe not.

19 HONORABLE DAVID EVANS: -- of these cases do  
20 you think are going to come up that the pleading motion  
21 doesn't seek a declaration that the statute is  
22 unconstitutional? I'm just sitting here trying to think  
23 about how many of these are not going to fall --

24 MR. GILSTRAP: In declaratory judgments.

25 HONORABLE DAVID EVANS: -- in the

1 Declaratory Judgment Act because the pleading and motion  
2 for summary judgment or the brief or whatever or in the  
3 prayer is going to seek a declaration from the court or a  
4 ruling that it's unconstitutional, and I feel like we'll  
5 almost be stepping into the dec. action at that point.

6 MR. GILSTRAP: You can certainly --

7 HONORABLE DAVID EVANS: The one that was  
8 given, the exemplary damages I understand, but that's  
9 always based on an amount you know it doesn't -- it  
10 doesn't -- you understand my question, so what is the  
11 problem that this rule is addressing that is not covered?

12 MR. GILSTRAP: Certainly allows the  
13 plaintiff to avoid the problem with a Declaratory Judgment  
14 Act by not seeking declaratory judgment, and there are  
15 other ways to have a statute declared unconstitutional.

16 HONORABLE STEPHEN YELENOSKY: Well, they may  
17 not seek to have it declared unconstitutional. They may  
18 just be arguing that something is unconstitutional,  
19 therefore they win.

20 MR. GILSTRAP: It's unconstitutional,  
21 therefore I win.

22 HONORABLE STEPHEN YELENOSKY: Right.

23 CHAIRMAN BABCOCK: Justice Hecht.

24 HONORABLE NATHAN HECHT: Well, I doubt that  
25 it should always be reversible error, but the problem, the

1 history of the problem, is that courts are too quick to  
2 attribute too many consequences to a failure like this,  
3 not the other way around. The problem that Dubai and  
4 several cases in the U.S. Supreme Court all address is  
5 that courts are unwilling to think of any consequence less  
6 than jurisdictional or dismissal to remedy the problem, so  
7 if you're silent -- entirely silent on the subject, you  
8 risk that problem.

9 MR. SCHENKKAN: And on that, what I was  
10 relying on -- I agree, I think that's the focus, and in  
11 saying that I didn't think we need comment four I was  
12 relying on the proposition we were still going to have  
13 (d) --

14 HONORABLE JANE BLAND: Right.

15 MR. SCHENKKAN: -- in the rule itself, which  
16 is now going to be (c), which says that the party's  
17 failure to file and serve, and, of course, court's failure  
18 to serve comes out, but does not forfeit, and I thought  
19 that was enough to -- but if that's not enough then I  
20 agree with you we need to wrestle with this further.

21 CHAIRMAN BABCOCK: Justice Bland.

22 HONORABLE JANE BLAND: If you want to add to  
23 (d) "does not forfeit a constitutional claim or deprive  
24 the court of jurisdiction," then that's the fix. If  
25 that's what you're worried about, that's the fix, not to

1 say that every case where this is never litigated or  
2 raised -- I mean, I'm worried about the gotcha on appeal,  
3 the reversible error of gotcha on appeal.

4 HONORABLE STEPHEN YELENOSKY: And then you  
5 would take out comment four.

6 HONORABLE JANE BLAND: Yeah, take out  
7 comment four, leave (d) in, and say, "does not deprive the  
8 court of jurisdiction or forfeit a constitutional claim or  
9 defense that is otherwise timely asserted."

10 CHAIRMAN BABCOCK: Gene.

11 MR. STORIE: I agree with that, and I would  
12 also suggest adding something like, "but any party  
13 desiring to appeal must promptly give notice of the  
14 constitutional question to the Attorney General," because  
15 you still want the Attorney General to be able to weigh in  
16 if the issue is going forward.

17 CHAIRMAN BABCOCK: Justice Gray.

18 HONORABLE TOM GRAY: I framed the problem in  
19 terms of the questions -- and I didn't know these comments  
20 were being considered for inclusion with the proposal. I  
21 think there's a lot more issues in the comments than just  
22 with four, but where did the trial court err, because  
23 that's what this comment starts with, failure of the  
24 notice under this rule constitutes reversible error.  
25 Where was the trial courts's error, where was the error

1 preserved, and where is, what is, the harm caused by that  
2 error? If you want to sort of add something to the  
3 current provision 4 or (d) or whatever it is, you could  
4 add something in the nature of "Failure to give notice  
5 results in a judgment binding only on the parties and  
6 provides no precedential value for other courts." The  
7 benefit of that is you still leave the parties arguing  
8 over the issues they present, and it's binding on those  
9 parties, but it doesn't bind other people that were not  
10 involved in that litigation.

11 CHAIRMAN BABCOCK: Okay.

12 HONORABLE TOM GRAY: And you wind up with an  
13 enforceable final judgment no matter how bad the parties  
14 may have presented the issues.

15 CHAIRMAN BABCOCK: Justice Bland.

16 HONORABLE JANE BLAND: Well, I agree that's  
17 one workable solution, but I don't think we should put it  
18 in the rule. I think that the trial courts and the  
19 appellate courts that get a real case can grapple with  
20 crafting what to do if the notice isn't sent, and they can  
21 decide if there's a lack of jurisdiction or it's not going  
22 to be binding on anybody other than the parties or  
23 whatever, but what we do by putting that in a rule is we  
24 clear the table of any other possible solutions to the  
25 problem, and we know -- we know one problem about the



1 jurisdiction, so we can put that in to address that  
2 problem, but I don't think we should start trying to  
3 micromanage what the remedy is for violating a rule, and  
4 we have very few rules where we do that.

5 CHAIRMAN BABCOCK: Frank.

6 MR. GILSTRAP: You know, Justice Bland's  
7 suggestion solves a lot of problems. I think we ought to  
8 adopt it and stop there and not go on to the comments.

9 CHAIRMAN BABCOCK: Okay. How would it read  
10 with Justice Bland's suggestion?

11 MR. GILSTRAP: It would just be added to  
12 (d).

13 CHAIRMAN BABCOCK: Okay. "No forfeiture, a  
14 party's failure to file and serve the notice does not  
15 forfeit a constitutional claim or defense that is  
16 otherwise timely asserted," and --

17 HONORABLE JANE BLAND: I think you would  
18 move it -- because it's shorter you would put it ahead of  
19 that. You would say after "serve the notice or the  
20 court's failure to certify" "does not deprive the court of  
21 its jurisdiction or" -- except it's talking about the --  
22 yeah, "or forfeit a constitutional claim or defense."

23 HONORABLE STEPHEN YELENOSKY: And then you  
24 want to change the title to "No forfeiture," don't you,  
25 because the main point is no lack of jurisdiction.

1 HONORABLE JANE BLAND: Yeah, you could say  
2 "Jurisdiction and forfeiture."

3 HONORABLE STEPHEN YELENOSKY: Or  
4 "Jurisdiction and no forfeiture."

5 HONORABLE JANE BLAND: Yeah, "Jurisdiction  
6 and no forfeiture."

7 CHAIRMAN BABCOCK: Okay.

8 HONORABLE TOM GRAY: How about just  
9 "Consequences"?

10 HONORABLE JANE BLAND: That doesn't give the  
11 Attorney General much teeth, but I think that still would  
12 not preclude somebody from asserting on appeal that it was  
13 reversible error, and the appellate court could evaluate  
14 that along with everything else that's happened in the  
15 case to decide whether or not it created any kind of harm  
16 or problem.

17 CHAIRMAN BABCOCK: Okay. So the title would  
18 be now, "Jurisdiction and no forfeiture" and then it would  
19 say, "A party's failure to file and serve the notice does  
20 not deprive the court of its jurisdiction or forfeit a  
21 constitutional claim or defense that is otherwise timely  
22 asserted." Is that the way you propose it?

23 HONORABLE JANE BLAND: Sounds good.

24 CHAIRMAN BABCOCK: Yes? Frank?

25 MR. GILSTRAP: Yeah, that's it.

1 HONORABLE STEPHEN YELENOSKY: How about,  
2 just a friendly amendment, "does not constitute a  
3 forfeiture of the claim," just the language.

4 CHAIRMAN BABCOCK: Okay. Carl.

5 MR. HAMILTON: If we put that provision in  
6 there why would I send the notice then? Why would I want  
7 to do anything?

8 HONORABLE STEPHEN YELENOSKY: First because  
9 the trial court might say, "We need to back up."

10 CHAIRMAN BABCOCK: Yeah, Buddy.

11 MR. LOW: That was the question. I think  
12 it's an invitation to just don't send it, don't worry,  
13 I'll take care of it later. But I'm not suggesting not do  
14 it. I'm just saying that's one of the evils.

15 CHAIRMAN BABCOCK: Yeah, Gene.

16 MR. STORIE: Yeah. That's why I made the  
17 suggestion that if anyone wants to appeal that judgment  
18 then they have to send the notice, because you still want  
19 the AG to get notice at some point.

20 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

21 HONORABLE STEPHEN YELENOSKY: Well, I mean,  
22 I understand Justice Gray's point that there may be ill  
23 motives on the part of some trial judges; and we may need  
24 to write some rules for that purpose; but, first, let's  
25 assume that a lot of judges will try to respect the rule;

1 and if somebody doesn't give the notice and later on the  
2 court finds out about that that the trial court is going  
3 to do something about it; and so they need to worry about  
4 not giving notice because of that; and I don't -- I don't  
5 agree with Gene's suggestion because it does start to lay  
6 in what the consequences are here; and I'm particularly  
7 concerned about Justice Gray's suggestion that the  
8 consequence would be you'd only have -- it would have no  
9 precedential effect. That seems to me there are a lot of  
10 unintended consequences to that. That seems like a whole  
11 new area of jurisprudence. We will have certain cases  
12 with common law precedential effect and others that don't,  
13 so --

14 HONORABLE TOM GRAY: You missed my diatribe  
15 earlier.

16 HONORABLE STEPHEN YELENOSKY: Oh, I'm sorry,  
17 I did. Well, I'll go back and read it.

18 CHAIRMAN BABCOCK: Okay, Pete.

19 MR. SCHENKKAN: I mean, I think the reason  
20 you would go ahead and give the notice even though it says  
21 it doesn't deprive the court of jurisdiction and doesn't  
22 forfeit your claims because it might turn out to be  
23 reversible error in your case. You don't know, and that's  
24 a pretty good -- you might be wasting your time and either  
25 your money or your client's money or both, depending on

1 the terms of what you're being there about in the case if  
2 you don't get it right and the cost of sending notice  
3 isn't very high. I think compliance is going to be pretty  
4 good. It won't be perfect, never is, but --

5 CHAIRMAN BABCOCK: Okay. With the amended  
6 language on (d), how many people are in favor of having  
7 (d) as amended? Raise your hand.

8 All opposed? By a vote of 22 to 0, the  
9 Chair not voting -- did I miss anybody who was against it?  
10 I didn't see anybody. That passes.

11 MR. GILSTRAP: Let's quit while we're ahead.

12 CHAIRMAN BABCOCK: So let's quit while we're  
13 ahead, and let's take our morning break.

14 (Recess from 10:52 a.m. to 11:20 a.m.)

15 CHAIRMAN BABCOCK: All right, we're back,  
16 and we're back on the record, and, Frank, I think, and  
17 Carl both wanted to make a postscript comment about what  
18 we were just talking about, Rule 5.1.

19 MR. GILSTRAP: I want to make it clear on  
20 the record that the committee did not address the  
21 interpretive commentary, and that has not been approved.  
22 I want to put some people's mind at ease on that. The  
23 committee -- and that's just -- we didn't get to that, and  
24 so unless we do get to it, it obviously won't be part of  
25 the rule. Also, I think Buddy did mention something

1 during our discussion that I just overlooked, and I don't  
2 think we need to talk about it, but I think we'll consider  
3 it on the subcommittee, and that is one way that you get  
4 the attorney to comply with statutes if he's challenged  
5 the constitutionality of a statute, the way you get him to  
6 comply with the rule is maybe to require him to include  
7 the declaration of certificate of conference that he's  
8 notified the Attorney General. That's an idea. That's  
9 all I have.

10 CHAIRMAN BABCOCK: Okay. Carl, you had a  
11 comment.

12 MR. HAMILTON: Yeah, on paragraph (d) again,  
13 Pete's answer to me before we broke was that if you didn't  
14 give the notice that you might get reversed on appeal.  
15 Well, that may be so, but I think it's a bad idea to tell  
16 the lawyers in paragraph (d) that your failure to give  
17 notice, you're not forfeiting your rights to your  
18 constitutional claim, but then -- so then you go on with  
19 it in the trial court and then you get reversed in appeal,  
20 so I think it's a bad idea to tell them this in (d) but  
21 then allow them to be reversed on appeal.

22 CHAIRMAN BABCOCK: Okay. Any other  
23 postscript comments? All right. Let's move on to  
24 recusal. This is -- and specifically Rule 18b. To remind  
25 everybody, we have already gone through and finalized the

1 proposed changes to 18a that Justice Peeples took us  
2 through two or three meetings ago. Richard Orsinger is  
3 the subcommittee chair with respect to 18b, and he could  
4 not be here, but Justice Hecht wanted to get the  
5 discussion started. Judge Peeples, has he deputized you  
6 in any way to --

7 HONORABLE DAVID PEEPLES: He has not.

8 CHAIRMAN BABCOCK: -- do this? Okay. I was  
9 afraid of that. Kennon, has he --

10 MS. PETERSON: No.

11 CHAIRMAN BABCOCK: Not you. Anybody? All  
12 right.

13 MS. PETERSON: Isn't your name on the  
14 agenda?

15 CHAIRMAN BABCOCK: Yeah, I know the default  
16 was me. There is a -- there is a handout that if you-all  
17 can make heads or tails of it you're better than I am, but  
18 he's seemed to -- almost looks like a football play where  
19 the split end is going out for a pass, and so rather than  
20 try to deal with that I thought I might bring everybody up  
21 to speed on what our charge is here and what we have done  
22 in the past. Justice Hecht's charge to us was almost  
23 exactly a year ago, and that was to consider whether a  
24 court procedure rule should be amended in light of the  
25 Supreme Court's decision in *Caperton vs. Massey* as well as

1 the Texas Judicial Campaign Fairness Act; and the goal, as  
2 Justice Hecht said, is to promote public confidence in the  
3 judiciary and ensure litigants an impartial forum and  
4 provide elected judges in Texas practical guidance.

5           We were asked to -- and everybody I'm sure  
6 knows Caperton was the West Virginia case where some money  
7 was -- substantial money was put into an election campaign  
8 by a litigant in a case before the West Virginia Supreme  
9 Court, and one of the justices was asked to recuse and  
10 refused to, and the United States Supreme Court held that  
11 this -- his refusal to recuse was a denial of due process.  
12 It's long been the common law of this state that campaign  
13 contributions don't count generally for recusal of judges.  
14 In other words, you can come in and say, "I move to  
15 recuse, you know, Judge Smith because the lawyer on the  
16 other side contributed \$10,000 to his campaign," and  
17 that's not a basis for recusal.

18           We were asked back in 2001 to consider a  
19 change to 18b which was based on campaign contributions,  
20 and we had a number of meetings, and there's a very thick  
21 record -- hold it up, Angie -- a very thick record of what  
22 we talked about at that time. The Court -- the Court  
23 never acted on our recommendations, and it's not clear why  
24 they didn't act on it, but nevertheless, they didn't, but  
25 it's probably a good idea to go through a little bit what



1 we did back nine years ago. It's actually 10 years ago.  
2 We issued our report in February of 2001, I think. One of  
3 the things that we suggested was adding a new basis for  
4 recusal regarding a lawyer who is representing the judge  
5 or the judge's spouse or child. That may or may not be a  
6 good idea, but that really I don't believe is in the scope  
7 of what we've been asked to do here. On the issue of  
8 financial contributions, there is an El Paso case, a  
9 Dallas case, and a San Antonio case, all of which have  
10 rejected the argument that campaign contributions can be  
11 used to establish a bias that would warrant recusal.

12                   In 1999 there was a judicial campaign  
13 finance study committee that recommended to the Supreme  
14 Court that it promulgate some rules whereby campaign  
15 contributions would be a basis for recusal; and the Court  
16 asked us to weigh in on that; and what we came up with,  
17 generally speaking, was that if a judge accepted money in  
18 excess of what the state Election Code permitted -- and I  
19 think it's still the law that you can opt out of the --  
20 opt out of the limits, so any judge that was accepting  
21 more money than the voluntary limits of the Election Code  
22 would be subject for recusal. It was a little more  
23 complicated than that, but that's generally -- generally  
24 what we proposed after a great deal of debate. So that's  
25 the -- that's the campaign contribution side of it.

1           There's another side of the issue, and that  
2 is generating -- generated by a Supreme Court decision in  
3 2002 shortly after we concluded our work on 18b, and  
4 that's the *Republican Party of Minnesota vs. White*. As  
5 you-all may recall, that is a decision that struck down a  
6 portion of the Minnesota Canons of Judicial Conduct that  
7 dealt with a judge announcing his position about  
8 controversial issues; and the Court said that that canon  
9 was unconstitutional; and Justice Kennedy, who, as best I  
10 can tell, is the Supreme Court now, said that -- raised  
11 the prospect of recusal being a remedy -- a better remedy  
12 than restricting a judge's speech about important matters.

13           Following the *Republican Party vs. White*  
14 case, our Supreme Court asked a task force to look into  
15 the question, and as a result we repealed the announce  
16 clause of our canons, following the U.S. Supreme Court's  
17 lead. There was debate on the Court about whether another  
18 provision of the canon, the so-called promises clause, was  
19 constitutional; and Justice Hecht, writing separately for  
20 the Court, emphasized that the Court was not making a  
21 determination about whether that was constitutional or  
22 not, and he had some considerable doubts personally about  
23 whether the promises clause was constitutional.

24           And so in looking at the recusal rule we are  
25 asked to consider two things. One, what, if anything, are

1 we going to say in a rule about campaign finances, and  
2 what, if anything, are we going to say in a rule about a  
3 judge speaking publicly about issues that might come  
4 before him or her, all the way from announcing positions  
5 to promising to do something if elected on a particular  
6 area of the law or with particular litigants before him.  
7 I think that in the limited time we have today I think the  
8 Court feels that it would be beneficial to have a general  
9 discussion about those two issues and see how our  
10 committee feels about whether or not they should be  
11 engrafted into our Rule 18b, and, if so, how, or whether  
12 that's just a horrible idea, we ought to leave the rule  
13 alone and not do anything, and taking those comments will  
14 get Richard and his subcommittee some guidance so that  
15 they can come back at the next meeting and propose  
16 specific language changes, unless we all collectively say  
17 this is a horrible idea and let's not do it.

18           So why don't we start with contributions of  
19 money to judges. Should that be a basis for recusal, and  
20 if so, how? Anybody have thoughts on that? Lonny.

21           PROFESSOR HOFFMAN: I guess it might not be  
22 that helpful to say couldn't we just short-circuit this by  
23 deciding that we're not going to elect judges anymore?

24           CHAIRMAN BABCOCK: Yeah, let's do that.

25           HONORABLE STEPHEN YELENOSKY: That's what I

1 was going to suggest.

2 CHAIRMAN BABCOCK: Yeah, let's do that, and  
3 that will solve the problem. Carl.

4 MR. HAMILTON: Well, are you saying that the  
5 work that we did several years ago, which I think is shown  
6 in paragraphs (10) and (11) on page four of this handout  
7 on the contributions. Are you saying that the Court has  
8 rejected that or --

9 CHAIRMAN BABCOCK: No, not at all. Not at  
10 all.

11 MR. HAMILTON: Okay.

12 CHAIRMAN BABCOCK: What I'm saying is that  
13 the -- there was a substantial record made that resulted  
14 in those proposals, and it was submitted to the Court, and  
15 the Court did not act on it. Now, I suppose at least a  
16 defacto rejection, but the landscape has changed, and the  
17 United States Supreme Court has now said, at least in some  
18 cases, acceptance of campaign -- or not even acceptance,  
19 because the judge there didn't get the money himself, but  
20 the infusion of campaign money by a party litigant can as  
21 a constitutional matter of due process result in recusal.  
22 So the landscape has changed somewhat since we submitted  
23 that to the Court.

24 MR. MUNZINGER: Chip?

25 CHAIRMAN BABCOCK: Yeah.

1 MR. MUNZINGER: When you submitted (10) and  
2 (11) to the Court had the Republican Party of Minnesota  
3 case been decided?

4 CHAIRMAN BABCOCK: No. No. It was decided  
5 shortly after we finished our work.

6 MR. MUNZINGER: And that's a real sea change  
7 in the way that the United States Supreme Court has looked  
8 at elected judges and what can or cannot be said in  
9 campaigns and what can or cannot be done in campaigns.

10 CHAIRMAN BABCOCK: Absolutely, yeah. As I  
11 said, there are two pretty substantial changes in the law  
12 since we did our work, completed our work in 2001. Yeah,  
13 Alex.

14 PROFESSOR ALBRIGHT: This is about the  
15 campaign finance issue. Our rule says that a judge --  
16 talks about recusal for impartiality might be reasonably  
17 questioned or if there's a bias, and I believe -- I  
18 haven't read the Caperton case in several months, but I  
19 believe the Caperton case relies on that, saying it was a  
20 situation there where there was such a significant  
21 campaign contribution, under those circumstances was the  
22 situation where the impartiality was reasonably  
23 questioned. I can't remember if it was a bias or not. I  
24 can't remember the exact basis, but I would prefer to  
25 leave ours with these grounds and not specifically start

1 talking about campaign finances because what the Caperton  
2 case does is say under the Constitution there is a --  
3 there is a place where receiving certain campaign  
4 contributions under certain circumstances is -- violates  
5 due process.

6 CHAIRMAN BABCOCK: Right.

7 PROFESSOR ALBRIGHT: And I'm not sure we --  
8 we can draw a line and say getting a contribution of over  
9 X is -- violates Texas law, but I think that's more of the  
10 Legislature's business than ours, and I would prefer to  
11 leave ours as impartiality and leave it to the courts to  
12 decide at what point does it get over a certain situation  
13 where the due process is implicated or you could say  
14 impartiality is implicated, but I would rather leave it  
15 broad because I think getting into more detail about  
16 financial contributions is -- one, it's a can of worms;  
17 two, it's more of a legislative issue than our issue.

18 CHAIRMAN BABCOCK: So you're saying  
19 obviously you can't cross the due process line.

20 PROFESSOR ALBRIGHT: Right.

21 CHAIRMAN BABCOCK: But anything -- you would  
22 not be in favor of a rule that tries to move inside that  
23 line on the issue of campaign finances?

24 PROFESSOR ALBRIGHT: I would not.

25 CHAIRMAN BABCOCK: Yeah.

1 PROFESSOR ALBRIGHT: Not in this community.

2 CHAIRMAN BABCOCK: Yeah. Justice Sullivan.

3 HONORABLE KENT SULLIVAN: I haven't read  
4 Caperton in a little while as well, but it occurs to me  
5 that the issue raised in Caperton is even murkier in the  
6 sense that, as I recall, they did not limit the discussion  
7 to the direct contribution --

8 CHAIRMAN BABCOCK: Right.

9 HONORABLE KENT SULLIVAN: -- of money,  
10 because the -- in terms of the total dollars spent by that  
11 particular contributor, that was, as I recall, relatively  
12 small, because the amount that was spent -- the total  
13 amount spent on that campaign, if you will, I think the  
14 disproportionate share of the dollar amount was spent in  
15 indirect expenditures on behalf of the candidate, but not  
16 as a direct contribution to the candidate.

17 CHAIRMAN BABCOCK: Right.

18 HONORABLE KENT SULLIVAN: And I think that  
19 entered into the calculus as well, and I say that only in  
20 the context if we are contemplating some sort of rule, you  
21 can see that sophisticated people and sophisticated  
22 lawyers being who they are, one of the first things  
23 someone might think about is how one might end run the  
24 rule, and in that particular case you get a situation  
25 where you've already got this fairly obvious suggestion of

1 how you might do it, is simply do not make a direct  
2 campaign contribution but spend perhaps huge amounts of  
3 money attempting to influence the outcome of the election.

4 CHAIRMAN BABCOCK: Yeah. Yeah, I think  
5 you're right, but the one thing you said, Kent, was that  
6 the litigant spent a substantial amount of money. It's  
7 just that the judge who was the subject of recusal didn't  
8 directly receive much, if any, of that money. It was  
9 spent by indirect, like supporting his opponent and one of  
10 those 527's, whatever they are.

11 HONORABLE KENT SULLIVAN: Right. If I  
12 wasn't clear, that's exactly what happened.

13 CHAIRMAN BABCOCK: Right. Buddy.

14 MR. LOW: Chip, but you have contributions  
15 by a party and you have contributions by that party's  
16 lawyer, and we're getting a number of cases where they  
17 move to disqualify when a lawyer gave less than what he's  
18 authorized to give in state law. So Alex raises a good  
19 point, but I think one of the things is to try to  
20 eliminate if you come within this guideline then that's  
21 not going to be a ground, so try to eliminate some of  
22 those useless procedures where they raise that and then  
23 you have to have a hearing and so forth, so that's the  
24 counter to that.

25 PROFESSOR ALBRIGHT: So just a question, so



1 what you're saying is it might be worth it to have a  
2 provision that gave a safe harbor?

3 MR. LOW: I'm not drafting that, but I think  
4 what you say is very logical, but I say it doesn't  
5 accomplish -- one of the things I think they want to  
6 accomplish is that, and we are not even addressing the  
7 other thing about taking a judge's deposition and doing  
8 everything to try to make it uncomfortable, but they're  
9 raising -- a number of them are raising where they gave  
10 \$500, just a campaign contribution, and those, the court  
11 shouldn't have to worry with something like that, if  
12 they -- I mean, that's all.

13 CHAIRMAN BABCOCK: Yeah, Judge Yelenosky.

14 HONORABLE STEPHEN YELENOSKY: Well, I think  
15 we have to. We had a long discussion about this before,  
16 and my recollection about the safe harbor was that  
17 somebody posed some scenarios that convinced me it was not  
18 workable and not consistent with due process because in a  
19 small locale, for instance, somebody could contribute well  
20 within the statutory maximums for contributions in an  
21 election, yet it could constitute 90 percent of the  
22 contributions to that particular judge. In other words, a  
23 rule is going to be both overinclusive and underinclusive  
24 if it sets an amount, and since we're talking about due  
25 process, I don't think it's possible to simply set an

1 amount and say that's okay or even say that within the  
2 statutory maximums that we have that it's okay, because  
3 there can be other factors that would make it not okay,  
4 and I don't think there's any way around that ultimately,  
5 other than Lonny's suggestion, and that's what I think.

6 CHAIRMAN BABCOCK: Justice O'Connor seemed  
7 to think that that might be the solution as well.

8 HONORABLE STEPHEN YELENOSKY: Right.

9 CHAIRMAN BABCOCK: Justice Gaultney.

10 HONORABLE DAVID GAULTNEY: Just in response  
11 to Buddy's comment, I think we need to remember that we're  
12 proposing changes to Rule 18a that will provide a lot of  
13 procedural protection --

14 MR. LOW: Right.

15 HONORABLE DAVID GAULTNEY: -- against  
16 frivolous filings, and so I tend to agree with the  
17 professor that we ought to not try to get into the line  
18 drawing.

19 CHAIRMAN BABCOCK: Buddy.

20 MR. LOW: That might take care of it, and  
21 Steve raises a point that it might be a cumulative thing,  
22 that not just gave within the guidelines, but can add two  
23 or three other things together, and that's one of them.

24 HONORABLE STEPHEN YELENOSKY: Well, or just  
25 in that locale the only people who are giving money is

1 that one law firm and one might make a due process  
2 argument.

3 MR. LOW: I don't disagree with that, and  
4 maybe to take care of 18a will solve the problem I have.

5 CHAIRMAN BABCOCK: Okay. Alex, on your  
6 point, would a judge or would the system benefit from a  
7 rule, from an 18b rule that says we want to permit  
8 campaign expenditures to the limits of due process, sort  
9 of like we do with personal jurisdiction, but here's what  
10 we think that is? Would that benefit us with an attack on  
11 our rule?

12 PROFESSOR ALBRIGHT: You mean defining what  
13 it --

14 CHAIRMAN BABCOCK: Yeah, just saying --

15 PROFESSOR ALBRIGHT: I think defining what  
16 it is is about impossible. It's like defining due process  
17 under jurisdiction. We just say it goes to the extent of  
18 due process in Rule 108, but defining what that is is  
19 always dependent upon the specific circumstances of every  
20 case. I think that's what that --

21 CHAIRMAN BABCOCK: Yeah. Alistair.

22 MR. DAWSON: I mean, it seems to me if a  
23 judge has accepted contributions within the limits set  
24 forth by the statute, that that ought not to be a basis  
25 for a recusal. Conversely, if a judge has opted out of

1 the statute and has accepted contributions in excess of  
2 the statutory limits, that ought to be a basis of recusal.  
3 I don't know if you make it mandatory or permissive. I  
4 could see both sides of that. Personally I would go for  
5 mandatory.

6 PROFESSOR ALBRIGHT: That would not be due  
7 process. That would be another basis. It would not be --

8 MR. DAWSON: You're not saying it is.

9 PROFESSOR ALBRIGHT: Yeah.

10 MR. DAWSON: Correct. Correct. I do think  
11 if you decide to write a rule on the subject, this third  
12 party issue creates a huge quagmire that I can't figure  
13 out how to solve. I mean, what happens if -- you know,  
14 with no involvement of the judge whatsoever some person or  
15 entity decides that they want to spend a bunch of money  
16 attacking his or her opponent, and the judge has nothing  
17 to do with it. Is the judge then required to recuse  
18 himself or herself? Probably should, but I just don't  
19 know how you draft a rule that addresses that.

20 CHAIRMAN BABCOCK: Well, I mean, I suppose  
21 you could have a -- you could have a ground for recusal  
22 that says if a litigant or a lawyer has been involved in  
23 -- either directly or indirectly in efforts to influence  
24 the election of the judge, pro or con, at some level, then  
25 that's a basis for recusal. I mean, I suppose you could

1 write that. You know, whether you want to or not I don't  
2 know. Judge Yelenosky.

3 HONORABLE STEPHEN YELENOSKY: Well, why do  
4 we need anything other than the procedure? I mean,  
5 because I'm convinced that -- and I disagree with you,  
6 Alistair. I don't think we could write a safe harbor, and  
7 if you did write a safe harbor in the rule, since it's a  
8 due process issue, somebody can come in and argue on a  
9 constitutional basis that nonetheless they have a right to  
10 challenge and recuse, even though the state has written in  
11 the safe harbor as long as you give within the statutory  
12 limits because it's going to be judged by a due process  
13 standard, and the scenario I posed that somebody else  
14 originally posed is just it's within the statutory limit  
15 but it's completely disproportionate, so I don't think we  
16 can do it, and I don't think we should try. I think we  
17 should have a procedure and let the law fill it in.

18 CHAIRMAN BABCOCK: Yeah, Hayes.

19 MR. FULLER: I'll join the chorus of those  
20 who haven't read Massey in a while, but as I recall it,  
21 the problems with crafting any rule that we would have in  
22 this area I think were highlighted best by Chief Justice  
23 Roberts in his dissent where he raises, you know, 40  
24 questions as to -- number one, how would you come up with  
25 a rule, how would you enforce a rule, what kind of rule

1 would you have, that sort of thing; but at the same time,  
2 it cites somewhere in that opinion with approval the ABA's  
3 model rules, which were an attempt to come up with a rule.  
4 Yet, I agree with Professor Albright that really the issue  
5 there is that due process sets a minimum standard --

6 CHAIRMAN BABCOCK: Right.

7 MR. FULLER: -- and we can do more -- we can  
8 do more than that, but we can't do less than that. Along  
9 those lines, doesn't Massey itself provide us the basis  
10 for challenging a situation where we think a judge ought  
11 to be recused where campaign shenanigans have placed that  
12 judge's bias or impartiality in question? So I think, you  
13 know, as long as we've got the due process protections,  
14 which the Court has given us, if we run into a situation  
15 in the small city with a small contribution but the  
16 disproportioned influence, the indirect situation, if we  
17 can find evidence of that I think Massey itself provides  
18 us the basis for moving for recusal, and I'm not sure that  
19 we need to come up with an attempt at a black line. I am  
20 not a constitutional scholar, and I'll be the first one to  
21 say that.

22 CHAIRMAN BABCOCK: Justice Peeples.

23 HONORABLE DAVID PEEPLES: Yeah, I've got  
24 several points I want to make. First, we need to remember  
25 that unlike the West Virginia case where the judge heard

1 his own motion, our procedures both in the appellate  
2 courts and the trial courts mandate that a second judge be  
3 brought in to hear it. That alone puts us a long distance  
4 from Caperton. That's point one.

5 Now, I want to gently disagree, Chip, with  
6 your summary of the present law. I think you said that  
7 right now contributions can't be a basis for recusal, but  
8 I think the law is excessive contributions or  
9 contributions are not as a matter of law a basis because  
10 the only basis that get to the appellate courts were cases  
11 in which the judge did not grant the recusal.

12 CHAIRMAN BABCOCK: Yeah, let me interrupt  
13 you. I was just about to ask the question whether there  
14 has been any -- any cases after the Aguilar case that our  
15 research turned up in 2001. That's a '93 El Paso case.  
16 Is there anything since then? Does anybody know?

17 HONORABLE DAVID PEEPLES: But what I would  
18 say is -- I can't give you chapter and verse, but I'm sure  
19 that judges have been recused for campaign contributions  
20 where the judge assigned to hear that motion thought it  
21 was just too much, and those cases never get to the  
22 appellate courts because they're not appealable.

23 CHAIRMAN BABCOCK: Right.

24 HONORABLE DAVID PEEPLES: So those could be  
25 out there, and I think our system -- now, I can make

1 arguments for and against coming up with some more  
2 specific stands than 18b, but I think it's fair to say  
3 that our system as it is now and as it would be if 18a  
4 passes the Supreme Court allows -- if it's just too much  
5 or too close to the trial, a contribution comes in a day  
6 or two before a case is set for trial, our system would  
7 allow a recusal of that judge. Might not mandate it, but  
8 it might well happen, and so I -- gosh, I think there's  
9 some good arguments for a safe harbor. I think Judge  
10 Christopher argued a while back that we make judges run,  
11 and it would be nice if you could accept a contribution  
12 knowing this is okay and I'm not going to get hassled  
13 about it, this is okay to take this much money from this  
14 lawyer who is probably going to be in my court.

15           Yet, what if you take a bunch of money --  
16 and I'm talking about the summary judgment is a day or two  
17 later or the trial, as happened in *Pennzoil vs. Texaco*.  
18 That ought to be recusable if the judge who hears it and  
19 assesses everything thinks so, and I think it would be  
20 under the present law. So, again, I've got an open mind  
21 on whether we ought to come up with more specific  
22 procedures -- law in 18b, but I do think that our system  
23 as it is now and as it would be under the proposed 18a  
24 allow for recusal in egregious situations. Certainly in a  
25 Caperton situation.



1 CHAIRMAN BABCOCK: Yeah. Okay, good.  
2 Buddy.

3 MR. LOW: Also, what if you're a contractor  
4 and you have control over a lot of people. You say,  
5 "Okay, I'm going to give -- now, Chip, you do business  
6 with me, I want you to give so much to this one," and I go  
7 to about ten different people. I haven't violated -- I  
8 haven't given more, but the judge knows I sure raised him  
9 a lot more.

10 HONORABLE STEPHEN YELENOSKY: Bundling.

11 MR. LOW: I mean, so it is difficult to draw  
12 one line.

13 CHAIRMAN BABCOCK: Yeah. Yeah, Carl.

14 MR. HAMILTON: Well, we may not be able to  
15 draw lines for every single situation, but I think it's  
16 important that we draw at least a line saying that if the  
17 contributions exceed what's allowed by the Election Code,  
18 that's a ground, because in our part of the country it's  
19 perceived by all the judges that that's never a ground for  
20 recusal, and I think that if this committee thinks that it  
21 ought to be, we ought to put it in a rule because judges  
22 need to know that.

23 CHAIRMAN BABCOCK: Judge Christopher.

24 HONORABLE TRACY CHRISTOPHER: Well, I do  
25 think that judges ought to be able to have a safe harbor

1 with respect to taking a campaign contribution that's  
2 within the statutory limits, but I'm not really sure how  
3 we could write that into 18b, because 18b is grounds for  
4 recusals. It's not grounds for safe harbor, and the  
5 way -- for example, the way No. 10 on the old draft is  
6 written is basically you get recused if you accept over  
7 that. Now, there might be a presumption implied that as  
8 long as you were within the limit it wouldn't be a ground  
9 for recusal, but it doesn't necessarily have to be that  
10 way, and it could be there would be a fact scenario  
11 presented where you gave within the legal limits but there  
12 were other factors involved too; and just like the judge's  
13 ruling might be a factor, the fact that -- but it's not by  
14 itself enough, you know, the fact that you gave the \$5,000  
15 might be a factor in a recusal decision.

16           But I would like to say one thing about the  
17 timing, because, I mean, the vast majority of people, of  
18 judges that raise money, have, you know, a fundraiser, all  
19 right, or maybe two fundraisers; and sort of the general  
20 process for a fundraiser is you send out a letter and say,  
21 "Please be" -- you know, a fundraiser, and I'm going to  
22 put you on my little invitation, and you send out the  
23 invitation and then you have a party. That process takes  
24 two months approximately, all right, and if I am going to  
25 have to stand down and not rule on anything for two months

1 or three months or four months, you know, whatever is  
2 appropriate because the, you know, 5,000-dollar check from  
3 Vinson & Elkins showed up in connection with my, you know,  
4 fundraiser, I don't think that's fair to say that timing  
5 is important. So, you know, I disagree with Judge Peeples  
6 in that regard, because, you know, that check will show  
7 up, and you may or may not have a motion for summary  
8 judgment on your, you know, calendar within that time  
9 period involving that law firm; and, you know, we have to  
10 run for election. That's the way you raise money, I mean,  
11 and to say suddenly that I'm no longer able to do the  
12 business of the court for an unspecified amount of time  
13 until the taint of the \$5,000 has disappeared strikes me  
14 as not workable.

15 CHAIRMAN BABCOCK: Yeah, I think Judge  
16 Peeples is not -- well, I'll let him speak.

17 HONORABLE DAVID PEEPLES: I agree with the  
18 way that she's stated it.

19 CHAIRMAN BABCOCK: Yeah.

20 HONORABLE DAVID PEEPLES: But what if there  
21 hasn't been a fundraiser and the trial is set and all of  
22 the sudden a big old contribution comes in right before?

23 HONORABLE STEPHEN YELENOSKY: Right.

24 HONORABLE DAVID PEEPLES: I mean, it's all  
25 based on the circumstances.

1                   CHAIRMAN BABCOCK:  And, man, that happens.  
2  I mean, I had a trial in the -- not in Dallas or Houston,  
3  but the week before trial a check showed up in the trial  
4  judge's office for more money than he had ever received  
5  from any other lawyer ever in his tenure on the bench, you  
6  know, thousands of dollars the week before trial, from the  
7  lawyer representing the plaintiff.

8                   HONORABLE STEPHEN YELENOSKY:  Well, and the  
9  other thing is, Judge Christopher, in that instance I  
10 would assume it's pretty unlikely that the opposing party  
11 hasn't also given you money, and so they're probably not  
12 going to file a motion to recuse.

13                   HONORABLE TRACY CHRISTOPHER:  Yes, but there  
14 shouldn't even be the presumption that somebody who sits  
15 out the fundraising process then gets to be holier than  
16 thou and file a motion to recuse.  "Well, I didn't give  
17 the judge any money so I get to file a motion to recuse  
18 the judge."  I mean, and with respect to timing, that was  
19 an issue back when we didn't have limits on when we could  
20 raise money, but the Legislature has now said you have --  
21 you have a fundraising window, okay, and you know, opens  
22 and closes as a certain -- and in a certain period of  
23 time; and you know, I mean, frankly, if you're serious  
24 about fundraising you spend a lot of that time, that  
25 little window, you know, trying to get money; and you

1 know, I'm just repeating myself; but, you know, that  
2 5,000-dollar check might show up; and it might show up at  
3 my campaign consultant's office and I don't even know  
4 about it until I'm in the middle of trial.

5 CHAIRMAN BABCOCK: Yeah. Judge Yelenosky.

6 HONORABLE STEPHEN YELENOSKY: Well, I mean,  
7 I think ultimately what that means is that the state's  
8 desire to have elected judges is running up against due  
9 process, and due process ain't gonna move, and, you know,  
10 if it becomes impractical for judges to raise money and  
11 run for office, as Justice O'Connor said, so be it.

12 HONORABLE TRACY CHRISTOPHER: I think that  
13 the Legislature included due process ideas in their mind  
14 when they set limits on how much money you could give a  
15 candidate for judge --

16 HONORABLE STEPHEN YELENOSKY: Well, they  
17 did.

18 HONORABLE TRACY CHRISTOPHER: -- and limited  
19 your ability to fundraise to a certain time frame.

20 HONORABLE STEPHEN YELENOSKY: But Judge  
21 Peeples has given you examples of where within the limits  
22 -- and as has Chip, one has a tolerable claim of a due  
23 process violation.

24 HONORABLE TRACY CHRISTOPHER: Tolerable  
25 maybe, but I don't see it, and I have read Caperton

1 pretty --

2 CHAIRMAN BABCOCK: Recently.

3 HONORABLE TRACY CHRISTOPHER: -- pretty  
4 seriously.

5 HONORABLE STEPHEN YELENOSKY: Well, I have,  
6 not recently.

7 CHAIRMAN BABCOCK: Judge Peeples.

8 HONORABLE DAVID PEEPLES: The majority in  
9 Caperton just almost on every page said, "This is an  
10 exceptional case." Look at the numbers and the numbers as  
11 a percentage of contributions, and the case was right  
12 there in his court. This is an exceptional case, and they  
13 almost said there will never be another one like it. So I  
14 think we need to be careful in saying what due process  
15 requires because four of them said, "Even this doesn't get  
16 it," and five of them said, "This is so extraordinary it  
17 will probably never happen again." They almost said that.

18 CHAIRMAN BABCOCK: Yeah. Yeah, it seemed to  
19 me that the majority was going out of its way to meet the  
20 criticism that Justice Roberts was leveling at them, that  
21 there's a Pandora's box here that you're opening that is  
22 going to be terrible, and, of course, it did open it, and  
23 that's why we're having this discussion.

24 HONORABLE DAVID PEEPLES: And I think it was  
25 Hayes, very quickly who said we can do more than due

1 process requires, and we maybe already have, but we're not  
2 limited by what due process is.

3 HONORABLE STEPHEN YELENOSKY: Well, and,  
4 yes, and if it's not a violation of due process for what  
5 happened in your scenario, Chip, to have occurred --

6 CHAIRMAN BABCOCK: Right.

7 HONORABLE STEPHEN YELENOSKY: -- it still  
8 should be a basis for recusal, and therefore, I'm against  
9 the safe harbor.

10 CHAIRMAN BABCOCK: Carl.

11 MR. HAMILTON: Since this discussion is to  
12 be some guidance for the subcommittee, do I assume  
13 correctly that we need to write a rule that covers the  
14 problem in Caperton in addition to the rule that we  
15 already have written about exceeding the contributions  
16 allowed by law?

17 CHAIRMAN BABCOCK: I -- my view, anyway,  
18 Carl, is that that's one of the same situation. I mean,  
19 we've written this rule, subpart (10) and subpart (11),  
20 without having Caperton really in mind, but it's the same  
21 issue. I mean --

22 MR. HAMILTON: Well, but it's a little  
23 different.

24 CHAIRMAN BABCOCK: It is a little different.

25 MR. HAMILTON: It's a little different

1 because we're -- in (10) and (11) we've tied it solely to  
2 the Election Code and the amounts set there.

3 CHAIRMAN BABCOCK: Right.

4 MR. HAMILTON: And Caperton involved  
5 something a little different.

6 CHAIRMAN BABCOCK: Oh, I agree. I agree.

7 MR. HAMILTON: So can we assume that we're  
8 going to leave (10) and (11) as-is and then work on  
9 something in addition to that?

10 CHAIRMAN BABCOCK: I wouldn't -- I didn't  
11 sense in this room that there was a consensus about (10)  
12 and (11), but maybe I'm wrong. It was very controversial  
13 in 2001. You were there, you remember.

14 MR. HAMILTON: Yeah.

15 CHAIRMAN BABCOCK: And a lot of people here  
16 in this room, though, weren't there in 2001, but  
17 Representative Dunnam was on our committee, and he was  
18 outraged because he thought we were stepping over the line  
19 from procedure to legislation, and several people agreed  
20 with it. So Justice Gray.

21 HONORABLE TOM GRAY: I'll have to confess  
22 that I did not know that the campaign fairness guidelines  
23 were simply guidelines that a candidate could choose to  
24 ignore, and I read them as being absolute caps, so if --  
25 but I will also confess that I did not have any problem



1 with contributors bumping up against the cap, so maybe  
2 that's why I didn't study it that well, but I look back at  
3 the discussions fairly extensive of what we had in the  
4 draft of 18a and Judge Peebles' comments regarding rulings  
5 of the judge, and I think about that in the context of  
6 money --

7 CHAIRMAN BABCOCK: Yeah.

8 HONORABLE TOM GRAY: -- and I think, you  
9 know, no, the rulings alone cannot be the basis of the  
10 recusal of the judge, but certainly whether it's a  
11 thousand dollars or a hundred thousand dollars, the fact  
12 of a contribution to a judge based on all the facts and  
13 circumstances surrounding that campaign must surely be  
14 capable of being a factor in this judge's -- not the same  
15 judge that is a target of the recusal, but another judge  
16 reviewing all the facts and circumstances, whether or not  
17 that judge should be recused. I think in light of Carl's  
18 comments maybe it would be good to include for the  
19 subcommittee's guidance including in the factors that can  
20 be considered in recusal the nature and extent of the  
21 contributions given to the judicial candidates before, you  
22 know, the -- who's going to be deciding the motion.

23 And a comment that you made reinforced a  
24 thought that I was having, our focus has been on safe  
25 harbors and things for the candidate that is sitting on

1 the bench. I think the same factors have to be considered  
2 about contributions and money that was given to the person  
3 that was defeated and whether or not it was me that was  
4 fighting against the guy --

5 CHAIRMAN BABCOCK: Right.

6 HONORABLE TOM GRAY: -- that's on the bench,  
7 guy or gal that was on the bench. So we can't become too  
8 myopic on who supported the judge that's on the bench.  
9 It's got to be both sides because fear of retribution can  
10 be very problematic, so I think it needs to be a factor.  
11 I think it needs to be implicit or express, or actually, I  
12 think it needs to be express in the rule that it's not  
13 just to the judge that's on the bench. It's to a  
14 candidate, whether they prevailed or not, and I just --  
15 the safe harbor provisions, while I understand the need  
16 and desire for them, they're just very, very difficult to  
17 draft because of the fact that it's a all facts and  
18 circumstances test.

19 CHAIRMAN BABCOCK: Yeah. Buddy, did you --

20 MR. LOW: Yeah. No, I think he's right, it  
21 buys for or against, and campaign contributions can -- I  
22 know for a fact make a difference, if you didn't give and  
23 you gave to the other candidate.

24 CHAIRMAN BABCOCK: Yeah. Justice Peeples,  
25 you say that you think that even though it hasn't resulted



1 in appellate decisions that campaign contributions are  
2 being considered in recusal proceedings. I'm just  
3 wondering if you agree with Carl that there's a perception  
4 out there -- I've certainly had it myself as a litigant --  
5 as a lawyer representing litigants -- that campaign  
6 contributions, basically don't waste your time. Do you  
7 think that's a general perception or not?

8 HONORABLE DAVID PEEPLES: Well, I think that  
9 perception is probably there, bolstered by the fact that  
10 if you try and lose your motion to recuse, you're stuck in  
11 that court, and that's a heck of a chill factor against  
12 filing in the first place. I can't cite you a specific  
13 instance of where it's happened, and Harvey was just  
14 asking me, I haven't had a contribution motion filed in a  
15 long time. Maybe never, so I don't personally have  
16 experience with these, but I do think that our -- all I'm  
17 saying is our system as it is has procedure there, and the  
18 general ground impartiality might be reasonably  
19 questioned --

20 CHAIRMAN BABCOCK: Yeah.

21 HONORABLE DAVID PEEPLES: -- to take care of  
22 it if it's just a big contribution, and it's out of the  
23 blue, "Oh, I'm assigned in your court, here is the money,"  
24 I think we can take care of that one. I can't guarantee  
25 that it would be granted, so that's to answer your

1 question.

2 I want to just while I've got the floor -- I  
3 had six contested elections. The only money I ever got  
4 from anybody was lawyers and personal friends.

5 MR. LOW: Right.

6 HONORABLE DAVID PEEPLES: The idea that  
7 there are public-spirited people out there is just bull,  
8 or that the insurance companies -- it is true that in San  
9 Antonio the medical and business communities got  
10 interested in about one or two election cycles, and so  
11 that was a third group, but personal friends and lawyers  
12 and that's it, and so if you make it easy to embarrass a  
13 judge by saying you took money, I mean, Tracy is right,  
14 the system just requires that you raise money, especially  
15 in the cities where that's the only way to reach the  
16 voters. So it's a difficult issue, we need to be careful,  
17 and I'm not sure what the answer is.

18 CHAIRMAN BABCOCK: Okay. Judge Christopher.

19 HONORABLE TRACY CHRISTOPHER: Well, I did  
20 read in the *Texas Lawyer* that -- I believe it was the  
21 *Texas Lawyer* that there was a recusal motion down in the  
22 Valley that was granted where the judge gave -- held a  
23 fundraiser for the judge -- the stated grounds were that  
24 the judge -- the lawyer held a fundraiser for the judge  
25 shortly before trial was supposed to start and -- but only

1 gave the -- you know, there was no allegation that that  
2 particular lawyer gave more than the statutory maximum,  
3 and it was reported that the judge was recused for those  
4 two reasons, and I also know that after Caperton down at  
5 the Harris County civil trial bench I saw at least three  
6 or four recusal motions where campaign contributions were  
7 issues raised.

8 CHAIRMAN BABCOCK: Yeah.

9 HONORABLE TRACY CHRISTOPHER: All within the  
10 Election Code minimum, but raised nonetheless.

11 CHAIRMAN BABCOCK: Yeah. Alistair and  
12 Bobby, I mean, do you -- have you ever had this come up in  
13 your practice?

14 HONORABLE TRACY CHRISTOPHER: Oh.

15 CHAIRMAN BABCOCK: Yeah, I'm sorry, Judge.

16 HONORABLE TRACY CHRISTOPHER: I'm sorry, I  
17 have one more thing.

18 CHAIRMAN BABCOCK: Yeah.

19 HONORABLE TRACY CHRISTOPHER: To me, the  
20 idea that if lawyer A gives money to my opponent and I  
21 win, that lawyer A can then come in and try to recuse me  
22 because he gave a bunch of money to my opponent strikes me  
23 as really wrong. I mean, because, you know, what better  
24 way to recuse a judge you don't like than to, you know,  
25 "Oh, I'm going to give \$10,000 to my friend Joe over here.

1 He doesn't have a chance of winning, but now I'm going to  
2 be able to recuse the judge because I gave \$10,000 to the  
3 opponent."

4 CHAIRMAN BABCOCK: That's what happened in  
5 Caperton.

6 HONORABLE TRACY CHRISTOPHER: No, no, no,  
7 no. No, it was for the judge.

8 HONORABLE STEPHEN YELENOSKY: It was for the  
9 judge.

10 HONORABLE TRACY CHRISTOPHER: It was for the  
11 judge, it wasn't the opponent.

12 MR. DAWSON: No, no, no. The money was  
13 spent bashing the opponent.

14 HONORABLE STEPHEN YELENOSKY: Bashing the  
15 opponent.

16 MR. DAWSON: Oh, right. Right.

17 HONORABLE TRACY CHRISTOPHER: Bashing the  
18 opponent to support the judge.

19 MR. DAWSON: Right. Right, to support the  
20 judge.

21 HONORABLE TRACY CHRISTOPHER: Not to --

22 MR. DAWSON: No, I hear you.

23 HONORABLE TRACY CHRISTOPHER: -- try and  
24 elect the other one.

25 CHAIRMAN BABCOCK: Alistair, has this ever

1 come up in your practice? I mean, is it on your radar?

2 MR. DAWSON: Direct contributions, no. I  
3 sort of find this one funny. We did have one recently  
4 where the basis of the recusal was that the plaintiff  
5 lawyer had taken the judge's husband golfing, and it  
6 turned out that the event was some pro-am where they  
7 spent, I don't know, four or five thousand dollars to get  
8 a team in the pro-am, and so that was the basis, but it  
9 was denied, as it should have been. But, no, I have not  
10 seen and not aware of motions being filed, but I do think  
11 that, you know, we need to do something. We need to do  
12 something, one, because this is the system that we're  
13 stuck with, unfortunately. I don't have any confidence  
14 that the Legislature is going to address the issues raised  
15 by Caperton. I don't have confidence in the Legislature  
16 period, but that's a whole different issue.

17 CHAIRMAN BABCOCK: Now, now.

18 MR. DAWSON: Personally --

19 MR. MEADOWS: There we are.

20 MR. DAWSON: Personally I would like for us  
21 to craft a rule that says that if you've ever received a  
22 penny from anyone you're automatically recused so that  
23 every judge would have to recuse and they would have to  
24 change the system and we could go back to Lonny's  
25 solution, but I do think that Judge Christopher is right.





1 If the Legislature has said, look, you can accept money up  
2 to these limits, that ought to be a safe harbor, absent  
3 unusual circumstances; and, you know, I understand that  
4 there can be a contribution right before the summary  
5 judgment. You know, that's I think rare, but it could  
6 happen, and I think you could craft language that says  
7 that, you know, absent unusual circumstances it is  
8 generally permissible and shall not be a basis for a  
9 recusal if you've accepted within the statutory limits.

10 CHAIRMAN BABCOCK: Bobby, what's the  
11 practice in California?

12 MR. MEADOWS: Yeah, right.

13 CHAIRMAN BABCOCK: In case anybody doesn't  
14 know it, Bobby just got a verdict in a four-month trial in  
15 California.

16 MR. MEADOWS: Happy to be home.

17 CHAIRMAN BABCOCK: Happy to be home, but won  
18 the case.

19 MR. MEADOWS: Well, I agree with Judge  
20 Christopher, too. I have to say that it's so much better  
21 than it used to be. I mean, really just doesn't -- it  
22 feels completely different than it did 10 years ago, 20  
23 years ago, but Judge Peeples is right. I mean, as long as  
24 we have this system it's only going to be supported by  
25 lawyers, and I don't -- we've got to find a way to do it

1 so that it has a feel and appearance of being right and  
2 fair. I mean, I've been in your situation, too, where  
3 there's a lawyer on the other side -- but it's rare, but a  
4 lawyer on the other side gives a lot of money to the  
5 judge, and you wonder what it means, but I also share your  
6 view that that's a pretty unappealing thing to challenge,  
7 just not likely to succeed, you're going to have a big  
8 problem when you don't.

9 CHAIRMAN BABCOCK: Yeah, that situation I  
10 described, I didn't even consider trying to recuse the  
11 judge. You know, I just kind of noted it and said,  
12 "Whoops, this is not going to be a fun experience at  
13 trial."

14 MR. MEADOWS: Don't you think -- does anyone  
15 think that the -- at least in terms of application that  
16 it's a lot better now than it used to be? I mean, we -- I  
17 just don't have the sense that it's that --

18 HONORABLE KENT SULLIVAN: What's better?

19 MR. MEADOWS: That this business of buying  
20 influence or the appearance of it with the courts.

21 CHAIRMAN BABCOCK: Jim, what do you think?

22 MR. PERDUE: Well, I don't know, it's --  
23 Caperton is as bad as it could get. I mean, it was pretty  
24 much the plan to buy an election.

25 CHAIRMAN BABCOCK: Right.

1 MR. PERDUE: So I thought the observation by  
2 Judge Peeples is dead on, which was that Caperton is such  
3 an outlier, and the idea that Caperton gives you any  
4 guidance to either Texas practice or anywhere, I don't  
5 know that you can use it, but I don't -- I've never even  
6 thought about filing a motion to recuse based on  
7 contributions.

8 MR. MEADOWS: I look at it all the time. It  
9 is true that I have -- most of the cases that I try these  
10 days for the last few years have been out of state, but we  
11 pay attention to that, and I just don't -- I don't find  
12 grounds, really, that I think are sustainable in  
13 challenging a judge on the basis of campaign  
14 contributions.

15 MR. PERDUE: But we've got -- I know that we  
16 had one recently in Harris County with either both of --  
17 and it was within the limits.

18 HONORABLE TRACY CHRISTOPHER: All of them --  
19 all of the ones I saw were within the limits but still  
20 made the recusal challenge.

21 MR. PERDUE: So, I mean, it was like \$2,500  
22 or something. It wasn't -- I mean, in Harris County, you  
23 know, so I do kind of disagree, though. I think that at  
24 least in my experience in the last couple of election  
25 cycles, especially at the appellate level, it looks like

1 there's a lot more than lawyers giving monies, a lot of  
2 private parties and interest groups and PACs that have  
3 gotten very active, it seems to me.

4 CHAIRMAN BABCOCK: Hatchell, you look like  
5 you're getting ready to say something.

6 MR. HATCHELL: No, I wasn't. I was on the  
7 original task force that reported to the Supreme Court on  
8 this --

9 CHAIRMAN BABCOCK: Yeah.

10 MR. HATCHELL: -- and I will say this: The  
11 one thing that sticks in my mind is it was an equally  
12 balanced group between plaintiffs lawyers, defense  
13 lawyers, appellate judges, and trial judges. Wayne Fisher  
14 was the chairman, Lisa Blue was on there, and the group  
15 spoke with one voice that the effect of money in the  
16 administration of justice was a very serious problem and  
17 needed to be dealt with. Every argument that's been made  
18 today we considered. I think we ultimately opted for the  
19 safe harbor approach with strong presumptions for anything  
20 beyond that, but it is a very, very difficult rule to try  
21 to write because of all of the things that people have  
22 said.

23 Judge Yelenosky raises, you know, one of the  
24 more important ones, and I was involved in a case much  
25 like you where a law firm 200 miles north of Austin gave

1 60 percent of the campaign contributions to a judge more  
2 than 200 miles west of Austin, and it was an absolute  
3 miracle how well they did in that court. I think the  
4 judge would have signed a steamship menu if they put it in  
5 front of him, and yet all of this was within the limits,  
6 and every ruling he made was reversed on appeal, but it's  
7 just -- it's a serious problem, and it's not easily  
8 handled, but I would go back and look at the task force's  
9 original report for a really, really balanced approach  
10 between people representing every aspect of the trial  
11 administration of justice.

12                   CHAIRMAN BABCOCK: Yeah, that's a good --  
13 Orsinger, listen to that comment and follow it, send a  
14 little message to Orsinger in the transcript here. Yeah,  
15 Justice Sullivan.

16                   HONORABLE KENT SULLIVAN: I don't want to  
17 divert the commentary, but I at least want to make a point  
18 very briefly that a lot of the serious problems that occur  
19 aren't limited to money influencing the process. If  
20 you're in particularly some of the smaller counties, a lot  
21 of it is political influence that exists independent of  
22 money specifically.

23                   CHAIRMAN BABCOCK: Right.

24                   HONORABLE KENT SULLIVAN: Because you've got  
25 a situation in which there may be people or small groups

1 that are, if you will, political kingpins, and they know  
2 that they can perhaps -- let's put it this way. A judge  
3 will know that his career or her career on the bench can  
4 be in jeopardy in these geographic areas if they rule the  
5 wrong way, and quite frankly, in the right circumstances,  
6 it can rise -- may be hard to prove. I'm not suggesting  
7 you even could prove it, but at least in an abstract  
8 fashion it can rise to the level of due process problem,  
9 and I think that almost everybody in this room knows what  
10 I'm talking about and many have probably experienced --  
11 experienced it personally, and I think that we're just  
12 kidding ourselves to the extent that we can limit a  
13 serious discussion only to money, and money is a serious  
14 problem. I'm not trying to play it down at all, but this  
15 other dynamic is very real, and it's equally serious.

16 MR. MEADOWS: Well, I don't have any idea  
17 how you -- election reform wouldn't even fix that.

18 HONORABLE KENT SULLIVAN: Oh, it could,  
19 sure.

20 MR. MEADOWS: Small town relationships  
21 you're talking about, they would exist. I mean, maybe  
22 they would even be made worse with a different form of  
23 obtaining judges, so -- and it's -- to my view, that  
24 happens all over this country. That's not just a problem  
25 with Texas.

1           HONORABLE STEPHEN YELENOSKY: It's not just  
2 a problem with elections. That's a problem with an  
3 appointment system as well.

4           MR. MEADOWS: That's my point. I think we  
5 need election reform, but it's not going to fix that  
6 problem.

7           HONORABLE KENT SULLIVAN: Well, for what  
8 it's worth, I don't agree with you. First of all, I don't  
9 know that you could ever come up with any system that  
10 fixes everything. The question is what improves it, and  
11 candidly, if you are a judge that's not subject to that  
12 kind of direct political influence, you're going to have  
13 more independence. There's no question about that in my  
14 mind.

15           CHAIRMAN BABCOCK: Richard.

16           MR. MUNZINGER: Why not give lawyers or  
17 parties a peremptory strike one time? You can move to  
18 recuse any judge you want at any time one time, and he or  
19 she has got to leave. And no grounds stated, just get it  
20 over with. We do that in some circumstances now I think  
21 with visiting judges.

22           CHAIRMAN BABCOCK: That's what they do in  
23 California.

24           MR. MEADOWS: Yeah. There's some value in  
25 the practice.



1 MR. MUNZINGER: But California they run on  
2 their record as well. It's a different bench. It's  
3 somewhat like New Mexico, and the truth of the matter is  
4 New Mexico trial judges for the most part are in my  
5 experience extremely fair, and it's not a serious concern,  
6 and my experience is limited. I have to say that, but why  
7 not just say, hey, everybody gets one strike on one judge,  
8 and that doesn't remove all these other grounds from here.  
9 It takes away safe harbor and what have you. It may or  
10 may not help in some places. I can recall as a young  
11 lawyer my adversary moving to disqualify the judge, and  
12 the judge granted the motion, and then re-assigned to his  
13 best friend who promptly killed that lawyer in every  
14 ruling that he made, and he went from the frying pan to  
15 the fire, and I understand that risk, but a rule which  
16 just simply says you get one strike, get out.

17 CHAIRMAN BABCOCK: Yeah. Yeah.

18 MR. LOW: Chip?

19 CHAIRMAN BABCOCK: Yeah, Buddy.

20 MR. LOW: Hey, if we get to something like  
21 that we're going to really raise some legislative -- I  
22 mean, if you don't think that's legislative, they'll think  
23 it is. I mean, we've had our arguments with the  
24 Legislature, but we come with up with some rule -- I'm not  
25 saying it's a bad rule, I'm not commenting, but the

1 Legislature is going to say that's legislative, we're  
2 going to allow that you're stepping your bounds, and  
3 Orsinger and I will be back testifying before the Senate  
4 and getting grilled.

5                   CHAIRMAN BABCOCK: Yeah. What about this  
6 language that we proposed back in 2001, (10) and (11)? It  
7 doesn't really, Judge Christopher or Justice Christopher,  
8 create a safe harbor, but it does at least give a little  
9 bit of guidance. Is this -- would we be recommending this  
10 to the Court again? Carl asked that question a minute  
11 ago. You know, should we assume that this committee feels  
12 the same way as the 2001 committee, that this is something  
13 that the Court should consider and consider enacting in  
14 light of Caperton now? Because I think Justice Sullivan  
15 said that -- or somebody over there said that Caperton is  
16 an outlier, but it does mention due process and campaign  
17 contributions in the same breath, so it may be an outlier,  
18 but it raises the issue, and there's going to be  
19 jurisprudence developed around the country based on  
20 Caperton, and just as the common law always does, there  
21 will be -- its contours will be filled in by others, not  
22 by the Supreme Court. So is (10) and (11) something that  
23 we would say is a good idea and we tell Orsinger to be  
24 sure that whatever else you do put that in there? How  
25 does everybody feel about that?

1 MR. PERDUE: I like (10) and (11). It makes  
2 life cheaper for me, so (10) and (11) is good.

3 CHAIRMAN BABCOCK: So Jim votes yes in favor  
4 of (10) and (11). Judge Christopher, Justice Christopher.

5 HONORABLE TRACY CHRISTOPHER: (10) is okay,  
6 I think, but (11) runs into that -- I think could run into  
7 that new Supreme Court opinion about -- like, for example,  
8 corporations contributing to elections and, I mean, in  
9 terms of those kind of limits.

10 CHAIRMAN BABCOCK: You're talking about  
11 Citizens United?

12 HONORABLE TRACY CHRISTOPHER: Uh-huh.  
13 Doesn't it?

14 CHAIRMAN BABCOCK: Well, Citizens United was  
15 a prior restraint case. It's -- I've read that pretty  
16 carefully and --

17 HONORABLE TRACY CHRISTOPHER: Well, but (10)  
18 is a judge's acceptance of it.

19 CHAIRMAN BABCOCK: Right.

20 HONORABLE TRACY CHRISTOPHER: (11) is  
21 someone else has spent money that I have no control over.

22 CHAIRMAN BABCOCK: Right.

23 HONORABLE TRACY CHRISTOPHER: I would not be  
24 in favor of (11).

25 CHAIRMAN BABCOCK: Okay. All right. Judge

1 Yelenosky.

2 HONORABLE STEPHEN YELENOSKY: Well, I mean,  
3 without (10) or (11) we know that there have been motions  
4 for recusal filed on the basis of contributions simply  
5 resulting from Caperton, right? I mean, without (10) or  
6 (11) lawyers have figured out that they can bring these  
7 motions even when it doesn't exceed it, so --

8 CHAIRMAN BABCOCK: Yeah.

9 HONORABLE STEPHEN YELENOSKY: I mean, I've  
10 been arguing all along that we may have a due process  
11 problem, and I guess here, on the other hand, I would say  
12 why do we need to encourage recusal motions by mentioning  
13 it in here when there's a basis for it based on Caperton?

14 CHAIRMAN BABCOCK: Well, because, I think  
15 the answer to that would be that (10) and (11) may or may  
16 not rise to the seriousness of a due process issue, but as  
17 a state we can say it may not be due process, but it's bad  
18 enough that we don't want a judge sitting on a case where  
19 either of these things -- events have occurred.

20 HONORABLE STEPHEN YELENOSKY: Okay.

21 CHAIRMAN BABCOCK: Justice Gaultney.

22 HONORABLE DAVID GAULTNEY: Oh, I don't want  
23 to reargue what I argued last time we considered this  
24 thing a year ago, but, you know, a judge who accepts money  
25 in excess of the limits has problems -- more problems than

1 a recusal. I mean, we have --

2 CHAIRMAN BABCOCK: Where to spend it, for  
3 example.

4 HONORABLE DAVID GAULTNEY: We have a system  
5 for that.

6 HONORABLE STEPHEN YELENOSKY: Well, it's not  
7 improper if they haven't -- if they haven't claimed to  
8 follow the limits, right? You can opt out.

9 CHAIRMAN BABCOCK: Yeah.

10 HONORABLE STEPHEN YELENOSKY: You're allowed  
11 to opt out. It's not a violation of the law.

12 HONORABLE DAVID GAULTNEY: So this is  
13 intended to deal with the --

14 HONORABLE STEPHEN YELENOSKY: A legal  
15 acceptance of a contribution over the limits.

16 CHAIRMAN BABCOCK: Right.

17 HONORABLE DAVID GAULTNEY: So what about --  
18 well, I guess the problem I had, and I understand that  
19 approach, but I guess the problem I had with this language  
20 is it attempts to read into the recusal statute language  
21 that may be interpreted very differently than we all  
22 think, just looking at this language here, because of the  
23 separate body of law that's dealing with what -- how a  
24 benefit is -- how a contribution is defined, which can get  
25 into very technical language, and I suspect -- I may be

1 wrong, but I suspect that the way this is handled is even  
2 without this language a contribution which is within the  
3 limits is not viewed as a recusal ground, and one that  
4 exceeded it probably would be. So, I mean, that's  
5 probably the practical effect of the way the process works  
6 now, and I just wonder -- I guess my concern when I first  
7 looked at this, I still have some concern, although I  
8 understand the benefit for the -- in a situation where the  
9 judge opts out, but is that we will turn recusal motions  
10 into essentially enforcement actions or Election Code  
11 applications, which we -- there's a process set up for  
12 that already.

13                   CHAIRMAN BABCOCK: Yeah. Carl, and then  
14 Judge Yelenosky.

15                   MR. HAMILTON: Two things. The Election  
16 Code itself provides us with all the definitions of what  
17 contributions are and so on, but this business of opting  
18 out, I'm not familiar with that, and I hope someone can  
19 explain it, because I thought the opt out provision only  
20 applied to the judge's reporting and all of that, but the  
21 limits on contributions that people can make were still  
22 applicable. Is that not correct or --

23                   HONORABLE STEPHEN YELENOSKY: Well, maybe  
24 I'm not remembering it right. Judge Christopher, it's  
25 been a while for me, but I thought you could say you were

1 -- some of the campaign limits are absolute, right? Is it  
2 the individual contributions?

3 HONORABLE TRACY CHRISTOPHER: I think it's  
4 the individual ones. What you can opt out of is your  
5 statutory cap --

6 HONORABLE STEPHEN YELENOSKY: Right.

7 HONORABLE TRACY CHRISTOPHER: -- which like  
8 in Harris County is \$300,000 for the election, and so you  
9 can opt out of only raising that amount of money or  
10 spending that amount of money.

11 HONORABLE STEPHEN YELENOSKY: So is this  
12 referring to the excess --

13 HONORABLE TRACY CHRISTOPHER: Very few  
14 people can do that.

15 HONORABLE STEPHEN YELENOSKY: Right. So if  
16 this is referring to an excess on the individual  
17 contributions then it would be more -- they would have a  
18 greater problem because they would have violated that law,  
19 but if it's referring to the excess in the total amount  
20 then if they don't pledge to follow that limit, they don't  
21 have to. An example of how it could be overinclusive,  
22 though, is somebody pledges to follow the limit, the other  
23 side doesn't pledge to follow the limit. The original  
24 pledgor is then released from his or her obligation to  
25 stay within the limit, but nonetheless, this would allow

1 it to be a grounds for recusal.

2 CHAIRMAN BABCOCK: Yeah, Judge Christopher.

3 HONORABLE TRACY CHRISTOPHER: There is an  
4 ethics opinion about direct campaign contributions in  
5 light of Citizens United. It's EAO 489, and so it would  
6 have to be looked at in connection with No. (11) to see  
7 whether it impacts it because it says that "The Ethics  
8 Commission will not be able to enforce 253.094 or 253.002  
9 of the Election Code to prohibit a corporation or labor  
10 organization from making a direct campaign expenditure.  
11 In addition the Ethics Commission cannot enforce 253.002  
12 of the code to prohibit a person from making a direct  
13 campaign expenditure." They -- "Citizens United does not,  
14 however, impede us from continuing to enforce the  
15 restrictions on corporations or labor organizations making  
16 political contributions to candidates."

17 CHAIRMAN BABCOCK: What's the cite again on  
18 that?

19 HONORABLE TRACY CHRISTOPHER: It's EAO 489.

20 CHAIRMAN BABCOCK: 489?

21 HONORABLE TRACY CHRISTOPHER: 489.

22 CHAIRMAN BABCOCK: Thank you.

23 HONORABLE TRACY CHRISTOPHER: So I knew that  
24 I had seen it. I don't know how it dovetails to what's  
25 there in (11), but --



1                   CHAIRMAN BABCOCK: Yeah. We would have to  
2 look at that. Yeah, Harvey.

3                   HONORABLE HARVEY BROWN: I just wanted to  
4 return to the argument a number of years ago that the  
5 Legislature crafted a remedy for violation of the Election  
6 Code, and we need to decide whether we want to be making  
7 policy determinations and whether we think those policy  
8 determinations for violation of a statute are the  
9 Legislature or for the Supreme Court, and I think there's  
10 some strong arguments for letting the Legislature decide  
11 the remedy for the code they enacted. So I don't want to  
12 let that pass without at least letting people think about  
13 it.

14                   CHAIRMAN BABCOCK: Yeah. As I said before,  
15 there was very strong sentiment on this committee in 2001  
16 that this proposal -- it was a minority of the committee,  
17 but still a vocal and large minority that thought we were  
18 usurping the Legislature's role by recommending this. So  
19 that's an issue.

20                   Why don't we -- why don't we take a little  
21 straw vote on (10) and (11) and see where people come  
22 down? We've already had some little voting going on here,  
23 Justice Christopher and Jim Perdue, but how many people  
24 are in favor of recommending subpart (10) to the Supreme  
25 Court, raise your hand.

1           How many people are opposed to that? That  
2 passes by a vote of 13 to 6, the Chair not voting.

3           What about No. 11? How many people are in  
4 favor of that?

5           And how many are opposed? 7 in favor, 11  
6 opposed, Chair not voting. For Orsinger's consideration,  
7 however, he should look into the issues that we're  
8 identifying today with respect to (11) for our discussion  
9 next time, because I think that Justice Hecht's interested  
10 in having our best proposal to submit to the Court, and  
11 maybe (11) will be part of that.

12           What I'd propose doing now is break for  
13 lunch and then come back and talk about the speech issues  
14 and whether or not we think there's something that can be  
15 crafted in the recusal rule to take into account the  
16 *Republican Party vs. White*. We'll do that for maybe an  
17 hour or so after lunch and go to the hanging party for  
18 Judge Abbott, General Abbott now. So we'll be in recess.

19           (Recess from 12:33 p.m. to 1:25 p.m.)

20           CHAIRMAN BABCOCK: We want to get back at  
21 it, and Justice Hecht has returned after making eloquent  
22 remarks to the appellate seminar, right?

23           HONORABLE NATHAN HECHT: Yes.

24           CHAIRMAN BABCOCK: So in the hour or so we  
25 have left let's talk about how we deal with the *Republican*

1 *Party vs. White* case vis-a-vis recusal. As you recall,  
2 that is the decision with the majority opinion written by  
3 Justice Scalia that found one of the canons of the  
4 judicial conduct unconstitutional, and I believe the canon  
5 that was struck down was that "A judge or judicial  
6 candidate shall not make statements that indicate an  
7 opinion on any issue that may be subject to judicial  
8 interpretation by the office which is being sought or  
9 held, except that discussions of an individual's judicial  
10 philosophy is appropriate if conducted in a manner which  
11 does not suggest to a reasonable person a probable  
12 decision on any particular case." Yeah, Judge Yelenosky.

13 HONORABLE STEPHEN YELENOSKY: Well, before  
14 you do that, Chip, can I --

15 CHAIRMAN BABCOCK: Oh, yeah, I'm sorry.

16 HONORABLE STEPHEN YELENOSKY: Because it  
17 does bear on (10), which passed, right?

18 CHAIRMAN BABCOCK: Yeah, right.

19 HONORABLE STEPHEN YELENOSKY: I told Chip  
20 during the break that I was at least half wrong, but on --

21 CHAIRMAN BABCOCK: Which means you're half  
22 right.

23 HONORABLE STEPHEN YELENOSKY: Half right,  
24 but it's probably important to point out what is correct  
25 as I now read it and I think other people acknowledge

1 after looking at this, is the law regarding the Judicial  
2 Campaign Fairness Act, and what I had said that is wrong  
3 is a person cannot opt out of the contribution limits, you  
4 can only opt out of expenditure limits. However, if a  
5 person opts out of expenditure limits, what that does is  
6 it releases the opposing person from the contribution  
7 limits, so in a race where a judge pledges to follow the  
8 expenditure limits, or a candidate, the opposing candidate  
9 doesn't pledge to follow the expenditure limits, then the  
10 individual who pledged to follow can now legally accept  
11 contributions which would otherwise be above that limit,  
12 and the opposing candidate cannot legally accept above  
13 that, and so as (10) is, as we've written it, would make,  
14 it seems to me, a ground for recusal against both of them  
15 if they accepted above that. Although, the way the act is  
16 written it is attempting to reward the complying candidate  
17 by releasing him or her from the contribution limits. So  
18 the point I made a long time ago about how this might  
19 apply sort of to the good guy in the eyes of the Campaign  
20 Fairness Act I think is a correct comment on this.

21 CHAIRMAN BABCOCK: Great. Thanks, and I'm  
22 sorry for not recognizing you before I got started on the  
23 judicial speech thing.

24 HONORABLE STEPHEN YELENOSKY: No, that's all  
25 right.

1                   CHAIRMAN BABCOCK: The canon that is still  
2 part of our law, the so-called promises clause says that  
3 "A judge or judicial candidate shall not make pledges or  
4 promises of conduct in office regarding pending or  
5 impending cases" and goes on to say a number of things.  
6 There is some question as to the constitutionality of even  
7 the promises clause, but for now it is part of our canons  
8 of judicial conduct. Justice Kennedy suggested in a  
9 concurring opinion in the White case that rather than try  
10 to stifle judicial speech that the courts should attempt  
11 to deal with any inappropriate remarks through recusal,  
12 and our recusal rule does not specifically deal with that  
13 issue, and the question is whether it should. So that's  
14 the topic on the table, and what's everybody think about  
15 that? Justice Patterson, you're -- well, go ahead,  
16 Justice Hecht.

17                   HONORABLE NATHAN HECHT: I just want to add  
18 one thing, which is that even a recusal rule that tries to  
19 take care of -- or tries to address these issues is not  
20 free of constitutional questions, because just as you  
21 can't keep the judge from speaking, to the extent White  
22 recognizes that, by the same token it's not clear how much  
23 you can keep him off the job. So I think Justice Kennedy  
24 has a good point, and everybody seems to think that  
25 recusal is a good approach to take, but we can't just --

1 but there may be limits out there, and I think we have to  
2 keep that in mind as we're talking about it.

3 CHAIRMAN BABCOCK: And when you say you  
4 can't keep him off the job, is it that you can't keep him  
5 off the job because he's entitled to work or because you  
6 can't keep him off the job for what he says?

7 HONORABLE NATHAN HECHT: For what he says.

8 CHAIRMAN BABCOCK: Yeah. That would raise  
9 the First Amendment issue.

10 HONORABLE JAN PATTERSON: Chip, would you  
11 pose the question again, please?

12 CHAIRMAN BABCOCK: What do you think?

13 (Laughter)

14 CHAIRMAN BABCOCK: The question in a general  
15 way is should we try to revise 18b to take into account  
16 judicial speech. A judge who has run on a platform of X,  
17 Y, or Z, should we try to deal with that in the recusal  
18 rule.

19 MR. LOW: Chip, does that come within his  
20 impartiality being questioned?

21 CHAIRMAN BABCOCK: Could be, sure.

22 MR. LOW: I mean, you know, impartiality  
23 questioned, you can't name everything, and is that one of  
24 them, because when you address that you confront certain  
25 issues that you can't come to grips with, constitutional

1 issues, and so there can be a number of things where  
2 impartiality may be questioned. The judge says, "I never  
3 give a child to the woman. I just don't give them -- I  
4 believe men ought to raise their kids." Well, his  
5 impartiality in a custody case could pretty well be  
6 questioned I think.

7 CHAIRMAN BABCOCK: Yeah. Yeah, Carl.

8 MR. HAMILTON: I sort of like the ABA model  
9 on page 12, paragraph (18).

10 HONORABLE TRACY CHRISTOPHER: Did you say  
11 page 12?

12 MR. STORIE: 15 I think you mean.

13 CHAIRMAN BABCOCK: Where it says,  
14 "Disqualification where a judge knows or learns by means  
15 of a timely motion that a party or party's lawyer or the  
16 law firm of a party's lawyer has within the previous X  
17 years" --

18 MR. HAMILTON: No, no. I'm talking about  
19 these materials that Richard sent out.

20 CHAIRMAN BABCOCK: I'm sorry. That was 12.  
21 14 you mean?

22 MS. SENNEFF: He's looking at the old memo.

23 MR. HAMILTON: It's a 65-page document.

24 CHAIRMAN BABCOCK: This one?

25 MR. LOW: ABA model code on page 14, begin

1 in what we have.

2 CHAIRMAN BABCOCK: Yeah.

3 MR. HAMILTON: I'm not on that page.

4 CHAIRMAN BABCOCK: Yeah. There is a draft  
5 that was with the materials for this time that has a page  
6 14 that's got a bunch of handwriting on it, and it says,  
7 "The judge while a judge or judicial candidate has made a  
8 public statement other than in a court proceeding,  
9 judicial decision, or opinion, that commits or appears to  
10 commit the judge to reach a particular result or rule in a  
11 particular way in a proceeding or controversy." Is that  
12 what you're talking about? No?

13 MR. HAMILTON: I'm looking at the materials  
14 that were handed out the last time. This says, "The judge  
15 shall disqualify himself or herself in any proceedings in  
16 which the judge's impartiality might be questioned,  
17 including but not limited to listed circumstances." It  
18 lists one such circumstance --

19 CHAIRMAN BABCOCK: Okay.

20 MR. HAMILTON: -- as "when the judge or  
21 judicial candidate made a public statement not in a court  
22 proceeding that commits or appears to commit the judge to  
23 reach a particular result or rule in a particular way or  
24 in a proceeding or controversy."

25 CHAIRMAN BABCOCK: Yeah. That's what I was



1 reading. We're just reading it from different places.

2 MR. HAMILTON: Oh, okay.

3 CHAIRMAN BABCOCK: What's everybody think  
4 about that? Anything? Judge goes to a meeting of  
5 doctors, and at the meeting of these doctors he says,  
6 "Look, I think I agree with you that these malpractice  
7 awards have just gotten completely out of control. I know  
8 the Legislature has dealt with it and tried to put some  
9 caps on it, but I still think you guys are not able to do  
10 your job because of these malpractice cases, and I just  
11 want you to know that I feel your pain."

12 MR. GILSTRAP: That's not a promise, though.

13 HONORABLE TRACY CHRISTOPHER: That's not a  
14 promise.

15 CHAIRMAN BABCOCK: It's not a promise.

16 HONORABLE TOM GRAY: But now if the same guy  
17 went to a plaintiffs lawyers convention and said, "I think  
18 those caps on med mal cases are unconstitutional, and if  
19 given the opportunity I am going to hold to that effect,"  
20 is that a promise? Okay, I'm not supposed to be asking  
21 the questions, but --

22 CHAIRMAN BABCOCK: No, I mean, yeah.

23 HONORABLE TOM GRAY: -- therein lies the --  
24 where do you go with it?

25 HONORABLE STEPHEN YELENOSKY: Are we talking

1 about promises that --

2 MR. LOW: No.

3 CHAIRMAN BABCOCK: Buddy.

4 MR. LOW: But it says "has made a public  
5 statement."

6 CHAIRMAN BABCOCK: Right. So the doctors  
7 group would qualify. That's a public statement.

8 MR. LOW: Or "appears to commit to reach a  
9 particular result." Doesn't say that he's promised. "I  
10 can't promise you I'm going to do this, but you just wait  
11 until it comes up before me, and you will" -- just face  
12 that issue.

13 CHAIRMAN BABCOCK: I'm the doctor's  
14 candidate in this race, you know, I'm the judicial  
15 candidate that likes the doctors. I think our professions  
16 have a lot in common, they're both under attack, and so  
17 you need to get your money and your influence behind me.

18 MR. LOW: That's right.

19 CHAIRMAN BABCOCK: Judge Yelenosky.

20 HONORABLE STEPHEN YELENOSKY: I don't  
21 know -- I mean, boy, this is tough. I mean, I could take  
22 another scenario where you appear to commit to something  
23 that is a settled area of the law. Does that give you a  
24 ground for recusal if I go and speak to a group, and I  
25 say, "Well, you know, the First Amendment case" -- or "A

1 prior restraint case, you know, you're not going to get a  
2 prior restraint except under these certain circumstances"?  
3 Is that a commitment? Probably is. Should I be recused  
4 for that?

5 CHAIRMAN BABCOCK: Was it at a seminar?

6 HONORABLE STEPHEN YELENOSKY: Yeah, it's  
7 public. It's public.

8 CHAIRMAN BABCOCK: Public seminar, and  
9 you're saying, "Here, I can read the Pentagon papers case  
10 as well as anybody, and let me tell you what it holds, and  
11 so don't come to me looking for a prior restraint."

12 HONORABLE STEPHEN YELENOSKY: Right. And so  
13 and nobody would really -- they might disagree with prior  
14 restraint law as a matter of policy, but nobody could  
15 really disagree that that was a correct statement of the  
16 law, literally I've committed to rule a particular way.  
17 Can you recuse me?

18 MR. LOW: Is that different from agreeing to  
19 follow the law?

20 HONORABLE STEPHEN YELENOSKY: Well, I guess  
21 that's the question. But is it still a ground for  
22 recusal?

23 MR. LOW: You swear to follow the law when  
24 you're sworn in.

25 HONORABLE STEPHEN YELENOSKY: Right, but so

1 does it only become a ground for recusal when you make a  
2 commitment to something that is an unsettled area of the  
3 law?

4 MR. GILSTRAP: I'm committed to free speech.

5 CHAIRMAN BABCOCK: Yeah, Richard.

6 MR. MUNZINGER: If you apply this ABA thing,  
7 it would not be limited to a commitment. It would be a  
8 statement that would imply. I'm a wise Latino, and in  
9 those cases involving --

10 CHAIRMAN BABCOCK: You're not going to  
11 persuade us in that.

12 MR. MUNZINGER: -- foreclosure and banks I  
13 intend to be certain that the law will take account of  
14 family needs. Is that a promise?

15 MR. LOW: No.

16 CHAIRMAN BABCOCK: Judge Christopher.

17 HONORABLE TRACY CHRISTOPHER: We're kind of  
18 putting the cart before the horse. I mean, the question  
19 is whether we are going to get rid of Canon 5 in the Code  
20 of Judicial Conduct and -- but put it in the recusal rule  
21 as a grounds to recuse versus just leaving it in the  
22 judicial conduct code. I mean, it's there now.

23 CHAIRMAN BABCOCK: Yeah.

24 HONORABLE TRACY CHRISTOPHER: We didn't  
25 repeal that, and, I mean, are we deciding that that is

1 unconstitutional and that --

2 CHAIRMAN BABCOCK: No.

3 HONORABLE TRACY CHRISTOPHER: -- therefore,  
4 it doesn't exist? I mean, there's a ton of things in the  
5 Code of Judicial Conduct that we don't put in our recusal  
6 rules. So it's in the Code of Judicial Conduct. Why do  
7 we put it in the recusal rule? The only reason we would  
8 put it in the recusal rule is if we thought it was  
9 unconstitutional in the Code of Judicial Conduct.

10 CHAIRMAN BABCOCK: I don't think that's what  
11 we're doing. I think that the announce clause has been  
12 repealed and held to be unconstitutional by the Supreme  
13 Court, so the question is whether or not, without  
14 violating a judge's First Amendment rights, you can remedy  
15 the problem of a judge going out there and making a public  
16 statement that the public would say, "Well, looks like  
17 this judge maybe isn't the right guy for the doctor's  
18 case."

19 HONORABLE TRACY CHRISTOPHER: But, I mean,  
20 there's already a prohibition against it in the Code of  
21 Judicial Conduct.

22 CHAIRMAN BABCOCK: Promises. Not announce.  
23 See, in my hypothetical he hadn't promised anything. He's  
24 just announcing what his views are. He hadn't promised  
25 how he's going to rule, and there's a -- and as justice --

1 as Hecht's, J., pointed out when the Court struck the  
2 announce clause, there may not be a practical difference  
3 between the promises clause and the announce clause, but  
4 that's for another day.

5 HONORABLE TRACY CHRISTOPHER: Well, the ABA  
6 one is a promises clause, not -- that wasn't an announce  
7 clause that we just looked at. Right?

8 CHAIRMAN BABCOCK: I don't know that it is.  
9 "Appears to commit" is different than promises.

10 HONORABLE STEPHEN YELENOSKY: Right.

11 CHAIRMAN BABCOCK: Yeah, Judge Evans.

12 HONORABLE DAVID EVANS: Well, we're going to  
13 witness and have witnessed already this election season  
14 commitments being made on various positions. We've had  
15 candidates criticize courts of appeals as being bad on  
16 religious freedom and attempt to be appointed to the  
17 bench, but under 18a, the one which says a judge shall  
18 dis -- shall recuse himself if his impartiality can be  
19 reasonably questioned, why doesn't this just all fall  
20 under that and the recusal motion be brought when someone  
21 has a political track record of speaking out on a  
22 particular matter and put it up for the presiding judge as  
23 to whether or not their impartiality can be reasonably  
24 questioned? That lets it be decided on a case-by-case  
25 basis as to the particular facts of the case without

1 having to draft a rule that has First Amendment  
2 implications.

3 CHAIRMAN BABCOCK: Okay. Carl, and then  
4 Justice Gray.

5 MR. HAMILTON: I'm a little confused. Are  
6 we just talking now about drafting a recusal rule?

7 CHAIRMAN BABCOCK: Yes.

8 MR. HAMILTON: Okay. Then Justice Stevens  
9 says in his opinion that the recusal rules could be more  
10 rigorous than due process requires in a Code of Judicial  
11 Conduct rule. So I don't know exactly what that means,  
12 but sounds like --

13 CHAIRMAN BABCOCK: And he's gone anyway.

14 HONORABLE STEPHEN YELENOSKY: Yeah.

15 MR. HAMILTON: Sounds like that we can --  
16 that it could be more onerous than the judicial conduct,  
17 but even so, to answer the judge's comment, if we just  
18 leave it on a case-by-case basis then each case that comes  
19 up the other side would be arguing Minnesota and say,  
20 "Well, you can't recuse on that ground because that  
21 violates due process," so we need to try to fashion a rule  
22 that will help resolve that problem.

23 CHAIRMAN BABCOCK: Justice Gray.

24 HONORABLE TOM GRAY: I think if I understood  
25 Judge Evans' comment that it's like -- we remember talking

1 about earlier, it's a factor like any other factor could  
2 be in considering recusal, so the short answer to your  
3 question as posed and rephrased to --

4 HONORABLE TRACY CHRISTOPHER: Tracy.

5 HONORABLE TOM GRAY: Tracy.

6 CHAIRMAN BABCOCK: That's Justice  
7 Christopher to you.

8 HONORABLE TOM GRAY: Except that it was Jan  
9 that actually asked for it to be rephrased, I think.

10 HONORABLE TRACY CHRISTOPHER: Oh, all right.

11 HONORABLE TOM GRAY: That the answer is no,  
12 so let's stay away from drafting it. I mean, I don't  
13 think it needs to be in there.

14 CHAIRMAN BABCOCK: Yeah. Judge Evans.

15 HONORABLE DAVID EVANS: I was trying to take  
16 in all the candidates. We had a candidate who put  
17 billboards up in an adjacent county that said, "Tired of  
18 eminent domain abuse? Vote for so-and-so for county court  
19 at law number such-and-such." I think that pretty well  
20 tells you where he's going to come down on those areas  
21 that he has exclusive jurisdiction in, and so the  
22 condemning authorities might have a motion to recuse that  
23 they'd want to bring under those circumstances, or I might  
24 have loose lips and in a group of friends say "So-and-so  
25 is never going to win a case. I'll never grant a verdict



1 or a judgment like that" or such-and-such. I don't know  
2 if that's public or not. Or I may go out and speak at a  
3 seminar and make such a commitment on my belief of the law  
4 that I would be bound by it, but all of those matters can  
5 be tested by the proof and affidavits on the motion to  
6 recuse. Trial judge looks at it, says, you know, "They  
7 got me. I'm out of here," or "They don't have me" and  
8 sends it on to presiding judge.

9 CHAIRMAN BABCOCK: Judge Peeples.

10 HONORABLE DAVID PEEPLES: Another angle  
11 here, we're talking about candidates that voluntarily go  
12 out and say things. It also happens when you run there  
13 are groups that send questionnaires, and there was a time  
14 when abortion was just always on those questionnaires, and  
15 I used to tell people "If you want me to answer this and  
16 take a position, here's what you're doing. I won't be  
17 able to hear any of these cases if I do it. Do you really  
18 want me disqualified from hearing these cases because I've  
19 answered your questionnaire?" And I kind of used it as a  
20 reason not to answer, which a lot of times I wanted to do.  
21 So there's a part of me that says it's a good thing if  
22 candidates can, you know, cop out by pointing to the  
23 recusal rule.

24 CHAIRMAN BABCOCK: Yeah. On the other hand,  
25 if we have an electorate system shouldn't the electorate

1 be informed about who they're putting in office? You can  
2 see -- you can read in the White case that that's -- you  
3 know, and particularly O'Connor saying, look, if you have  
4 this system, you know, you can't keep candidates from  
5 telling people how they feel.

6 HONORABLE DAVID PEEPLES: That was the  
7 candidate who wanted to talk.

8 CHAIRMAN BABCOCK: Yeah.

9 HONORABLE DAVID PEEPLES: Sometimes there  
10 are candidates who would love to have an excuse not to  
11 talk.

12 CHAIRMAN BABCOCK: Not to talk, that's  
13 right. That's right. Judge Evans.

14 HONORABLE DAVID EVANS: Well, I think most  
15 -- maybe there is a reason to put it in as a recusal rule  
16 as something to point to to those special interest groups  
17 that badger you, but I think most of us still cop out to  
18 any ultimate position and just say, "If you don't want me  
19 to hear these cases then I can -- I'll answer this, but I  
20 think you're making a mistake," and most people respect  
21 that. I haven't been pressed -- once you tell them you  
22 don't want to do it because you'll be recused, some could  
23 read that either way. It generally fends it off, but most  
24 of the trial judges or most of the judges I know believe  
25 right now if you go out and make a commitment type speech

1 to a group you're out of that lawsuit and you'll be  
2 recused, without anything in the rule.

3 CHAIRMAN BABCOCK: Yeah. Somebody over  
4 there? Judge Patterson, Justice Patterson.

5 HONORABLE JAN PATTERSON: But I think that  
6 is the virtue of having it in the rule, is that it is a  
7 concrete ground, because I regularly say in response to  
8 those questions, "This is a matter that may come before  
9 the court so I'm going to decline to answer it," but it's  
10 often viewed by special interests as welching, but if you  
11 can point to something concrete I think it's very helpful.

12 While I would hope that this could be  
13 covered under the impartiality rubric, what I like about  
14 this is that it focuses on the act, the commitment or  
15 appearing to commit, because I think it's so tempting for  
16 candidates if they're in front of a small group or a group  
17 of like minds to speak to these issues and hope that it  
18 never sees the light of day, but it is something that we  
19 need to resist, and I don't think it's a matter of settled  
20 areas of law versus unsettled. I think it's a commitment  
21 to a specific result. You know, we as judges can speak  
22 academically about the state of the law, these cases stand  
23 for this proposition, termination of parental rights is  
24 this, but we shouldn't be committing to a particular  
25 result, because the perception is that it's -- it's always

1 going to be perceived as following a certain line, whether  
2 or not it's settled or unsettled, and people are going to  
3 take something away from that.

4           So I think it's a slippery slope to suggest  
5 that it's unsettled areas. It's the act of committing or  
6 appearing to commit to a particular line of cases or --  
7 and we shouldn't be in that business, so I think that we  
8 should design a rule, and I do like this one. Also, you  
9 know, the problem with the White case, one other point, is  
10 that one of the reasons that it was written the way it is,  
11 is to discourage the election of judges, and it has  
12 presented us with a problem, because we still have to live  
13 within it, but it was meant to do away with the process  
14 that we now have to design around.

15           CHAIRMAN BABCOCK: Buddy, and then Judge  
16 Christopher.

17           MR. LOW: Chip, I'm not arguing for this,  
18 but that's one of the reasons the ABA says "made a public  
19 statement." I don't think they want to get down to,  
20 "Isn't it a fact that at a cocktail party you told John  
21 Jones such-and-such?" It needs to be an element above --  
22 above that, not that you just made a statement. I don't  
23 think they want disqualification to go that deeply, and  
24 I'm not saying it all can't come within appearance of  
25 impropriety, but I think the word "public" was used for a

1 purpose there in ABA.

2 CHAIRMAN BABCOCK: Yeah. Justice  
3 Christopher.

4 HONORABLE TRACY CHRISTOPHER: Well, I mean,  
5 if we're looking at the ABA language, that differs from  
6 what Texas law used to be. It's not the same language  
7 that's used in Canon 5 now. It's not the same language  
8 that was used in old Canon 5, so, I mean, I think you're  
9 sort of introducing a whole new set of issues if you use  
10 that ABA language, to me. And, you know, what does  
11 "appear to commit" mean?

12 CHAIRMAN BABCOCK: Appears to whom?

13 HONORABLE TRACY CHRISTOPHER: Someone asks  
14 you, you know, "Do you believe in abortion," and you say  
15 "yes" or you say "no," what have you appeared to commit  
16 to? Okay, that's my personal belief on an issue. It  
17 doesn't say if an abortion case ever came up in front of  
18 me that I would rule one way or the other with respect to  
19 it.

20 CHAIRMAN BABCOCK: Yeah.

21 HONORABLE TRACY CHRISTOPHER: I mean, I have  
22 to follow the law, and the law is the law, so, I mean --

23 HONORABLE STEPHEN YELENOSKY: Right.

24 HONORABLE TRACY CHRISTOPHER: -- I'm not  
25 sure what that means, appear to commit me to do anything,

1 and I don't see really how that helps you, David. I mean,  
2 yeah, I always say that, but it doesn't really apply if  
3 somebody asks me a personal question I don't want to  
4 answer. I'll say, "Well, better not be answering that  
5 question," but --

6 CHAIRMAN BABCOCK: Judge Evans.

7 HONORABLE DAVID EVANS: Well, I understand  
8 why the ABA -- the logic about public, but if the rule  
9 lays out that it's only public statements of commitment  
10 that gets you -- that is a ground for disqualification,  
11 does it create a safe harbor for the private statement  
12 that says, you know, "I could never grant a petition for  
13 abortion, could never grant one for a minor, could never  
14 do it, just couldn't." That's kind of a statement you  
15 make to close personal friends or anyone else, if that's  
16 your belief, then it's a private statement, not public,  
17 and now you've put in here only public statements. I  
18 think the rule -- we could live with the rule, but I don't  
19 agree with making it only public statements because that  
20 shouldn't be the only basis for a judge being  
21 disqualified.

22 CHAIRMAN BABCOCK: Picking up on Justice  
23 Christopher's point, in my hypothetical with the group of  
24 doctors and the judge is making the -- his speech, how do  
25 you prove that he appeared to commit? Is it the

1 reasonable doctor, or is it the reasonable person there?  
2 Can you call in a witness, somebody's spouse, who says, "I  
3 was there and, boy, it sure appeared to me that he  
4 committed, you know, not to allow large malpractice awards  
5 in his court." Does that get him disqualified? Do you  
6 have to have testimony like that?

7 MR. LOW: Let me clear one thing. I'm not  
8 arguing for that.

9 CHAIRMAN BABCOCK: Oh, yes, you are.

10 MR. LOW: I made a statement that the word  
11 "public" was probably, my guess, used that they didn't  
12 want to get down to detail. I'm not saying you shouldn't  
13 or you should. It merely was probably used for that  
14 purpose. They don't want to go that deeply. Now, the  
15 merits of it I'm not arguing. I only -- generalities or  
16 ask questions.

17 CHAIRMAN BABCOCK: Justice Peeples.

18 HONORABLE DAVID PEEPLES: There's a body of  
19 law in the criminal area, I can't summarize it, but it  
20 happens like this: The judge in a criminal case gives  
21 someone probation and then says, "Now, let me tell you  
22 something. If you violate the terms of this probation and  
23 come back to me, I'm making you do the time, and don't  
24 bother me with the arguments," and then there's a motion  
25 to revoke probation and a motion to recuse that judge for

1 having said, "I'm not going to assess the facts or  
2 anything. It's an open and shut case if you come back,"  
3 and I'm entitled to somebody with an open mind, and people  
4 have been recused when they really weren't saying -- it's  
5 a hyperbole.

6 CHAIRMAN BABCOCK: Right.

7 HONORABLE DAVID PEEPLES: But there are a  
8 bunch of cases out there on that exact situation.

9 CHAIRMAN BABCOCK: Wow. And you've had to  
10 deal with those --

11 HONORABLE DAVID PEEPLES: Uh-huh.

12 CHAIRMAN BABCOCK: -- as the administrative  
13 judge?

14 HONORABLE DAVID PEEPLES: But there are  
15 reported cases, too.

16 CHAIRMAN BABCOCK: Yeah. Yeah, Mike.

17 MR. HATCHELL: I would just observe, while  
18 I'm neither for nor against the ABA language, that I think  
19 it's much narrower than some of the examples, which are  
20 quite good examples, that have been brought up today. If  
21 you look at paragraph (a), it speaks about  
22 disqualification in a proceeding and then talks about "A  
23 judge committing to rule in a particular way in the  
24 proceeding," so I read it as making public statements  
25 while the judge is sitting at the time, judging a



1 particular case with real parties and a concrete set of  
2 facts and not to how I may rule on abortion sometime in  
3 the future.

4 CHAIRMAN BABCOCK: So in my hypothetical the  
5 meeting with the doctors would have to be while the case  
6 is going on?

7 MR. HATCHELL: That's the way I read it.  
8 I'm not saying that your concerns are not legitimate. I'm  
9 just talking about the ABA language itself.

10 CHAIRMAN BABCOCK: Hmm. I'm not sure I read  
11 it that way, but --

12 MR. HATCHELL: Depends on what "the" means  
13 in this term.

14 CHAIRMAN BABCOCK: I'm an "is" kind of guy.

15 HONORABLE STEPHEN YELENOSKY: Michael  
16 Jefferson.

17 CHAIRMAN BABCOCK: Any other comments about  
18 this? Frank.

19 MR. GILSTRAP: Well, you know, it just  
20 strikes me that sometimes when judges say these things  
21 they're not trying to curry favor with the electorate,  
22 they actually believe it.

23 CHAIRMAN BABCOCK: Oh, my goodness.

24 MR. GILSTRAP: And why shouldn't people  
25 know. I mean, what we're doing here is making it where

1 they have to keep their views private, you know, even  
2 though they may have strong views. It seems like there's  
3 something to be said to kind of get them out there.

4 HONORABLE TOM GRAY: Amen.

5 CHAIRMAN BABCOCK: And in free speech  
6 jurisprudence you always hear about the chilling effect,  
7 and somebody could attack this, sort of what Justice Hecht  
8 was saying, somebody could attack this ABA model rule on  
9 the basis that, hey, that this is chilling my right to  
10 free speech. You know, I ought to be able to talk about  
11 this, but I know if I do I'll get recused. Justice  
12 Sullivan.

13 HONORABLE KENT SULLIVAN: For what it's  
14 worth, I wanted to support Mike Hatchell's comment that as  
15 I look at the ABA language it really does appear to be  
16 narrower. It talks in terms of "commits or appears to  
17 commit the judge to reach a particular result or rule in a  
18 particular way in the proceeding or controversy" as  
19 opposed to just predisposed to a probable decision in  
20 cases with -- I mean, it seems to me one is significantly  
21 narrower than the other.

22 CHAIRMAN BABCOCK: Okay. Yeah, Judge  
23 Yelenosky.

24 HONORABLE STEPHEN YELENOSKY: Well, Frank's  
25 comment, I mean, I guess there are different things that

1 we -- judicial candidates and judges might say, and I  
2 guess if we weren't worried about appearances I think we  
3 would probably all agree, you know, I could say, "Well, I  
4 believe this, I believe this, but as a judge, you know, of  
5 course I'm not going to follow my beliefs, I'm going to  
6 follow the law." At the same time you might want to know  
7 in an unsettled area of the law, forgetting the facts  
8 because I shouldn't prejudge the facts, but I probably  
9 have an opinion about First Amendment law, for instance,  
10 the example I gave earlier.

11 MR. GILSTRAP: Especially when I'm a judge  
12 exercising my discretion or finding facts.

13 HONORABLE STEPHEN YELENOSKY: Right. And, I  
14 mean, we would all think it's wrong for a judge to say --  
15 to indicate that he or she will rule in a particular way  
16 when the ruling or the question is one that should depend  
17 on the facts. On the other hand, if you ask me a pure  
18 question of law, how would you rule if somebody requested  
19 a prior restraint and gave me, you know, a scenario. It  
20 seems fair that maybe you should be able to get the answer  
21 to that question so that you can determine -- because if I  
22 give you an answer that's inconsistent with settled law  
23 you probably don't want to vote for me.

24 CHAIRMAN BABCOCK: Yeah.

25 HONORABLE TOM GRAY: Could I ask him a

1 question of how he feels about a judicial canon that  
2 restrains my ability to speak publicly on issues and see  
3 if he would commit to a position on that?

4 CHAIRMAN BABCOCK: I'd like to hear him  
5 promise myself. Buddy.

6 HONORABLE STEPHEN YELENOSKY: You know, I  
7 mean, if we were worried about appearances and we could  
8 trust everybody to acknowledge when the person says, "I  
9 believe this," as Tracy said, "but, guess what, as a state  
10 trial court judge my opinion on abortion is meaningless as  
11 a judge." I mean, it's a U.S. Supreme Court decision. If  
12 people understood that, we wouldn't have to worry about  
13 it, but people don't really understand that.

14 MR. LOW: That's where we need -- we're  
15 going at it the wrong end. We need to educate the judges  
16 that they can say what they want to, their opinion and  
17 belief, but follow it by saying, "But if it comes before  
18 me I'm going to follow the law," like the jurors, you must  
19 follow the law.

20 CHAIRMAN BABCOCK: There you go.

21 MR. GILSTRAP: "I'm going to follow the law,  
22 but" --

23 MR. LOW: No, you put that last.

24 CHAIRMAN BABCOCK: Justice Peeples.

25 HONORABLE DAVID PEEPLES: As I grapple with

1 this, I think back in terms of jury selection. This is  
2 kind of analogous. Now, they haven't made statements when  
3 they show up, but they've got views, and frankly, we want  
4 jurors who have values and opinions about things but who  
5 can listen to the evidence and take the law from the court  
6 and decide the case based upon the evidence that they find  
7 credible in the courts. We don't want somebody that comes  
8 before us, "I don't have any views about crime." You  
9 know, I've got views about crime, but I can decide the  
10 case based upon the evidence, and this is kind of like  
11 that. I mean, we want a judge who, you know, has opinions  
12 and views and so forth, my goodness, but who is willing to  
13 listen to the -- you know, decide the cases on the law and  
14 the facts, and that's just kind of an analogous area of  
15 the law.

16 CHAIRMAN BABCOCK: Was that something you  
17 can crank into a rule?

18 HONORABLE DAVID PEEPLES: It's pretty hard  
19 in voir dire.

20 CHAIRMAN BABCOCK: Yeah, Justice  
21 Christopher. Sorry.

22 HONORABLE TRACY CHRISTOPHER: I seem to  
23 remember a few years back that a judge was admonished for  
24 having a MADD sticker, Mother's Against Drunk Driving  
25 sticker, on their car and -- which struck me as ludicrous,

1 since, I mean --

2 HONORABLE STEPHEN YELENOSKY: We're all --

3 HONORABLE TRACY CHRISTOPHER: -- we are  
4 against drunk driving, everyone is against drunk driving.  
5 I mean, it's against the law. You support the laws. So  
6 how can, you know, saying something like, "Yes, you know,  
7 I think drunk driving is, you know, a bad thing," how  
8 could that lead you to recusal or to be an extension by  
9 anybody? I mean, that clearly seems to violate your right  
10 to free speech.

11 HONORABLE STEPHEN YELENOSKY: Well, the  
12 problem with that is you're associating with a group that  
13 is saying more than just drunken driving is illegal. They  
14 have a legislative agenda, presumably. They also perhaps  
15 have an agenda that they want stricter enforcement or  
16 whatever, but I would agree with you if you just had a  
17 bumper sticker saying, "I'm against drunk driving," yeah,  
18 I don't see how that could do it.

19 CHAIRMAN BABCOCK: All right. Well, where  
20 do we go from here?

21 HONORABLE STEPHEN YELENOSKY: As far away as  
22 possible.

23 CHAIRMAN BABCOCK: We're going to punt on  
24 this one, I can tell. Yeah, Carl.

25 MR. HAMILTON: Well, I agree that this ABA

1 thing is very narrow in the sense that it is directed at a  
2 particular proceeding, which I guess has to be in  
3 existence at the time. I think it needs to be a little  
4 bit broader than that and perhaps include opinions that  
5 might bear on future proceedings, but, I mean, I guess the  
6 way I view it is almost everything is going to be  
7 protected by free speech so that what we have to do is  
8 fashion a rule that just tells the lawyers that the judge  
9 can say anything he wants to, but here are some of the  
10 things you can use which might be the basis for a recusal,  
11 but it needs to be a little bit broader than this ABA  
12 rule.

13 CHAIRMAN BABCOCK: Justice Hecht.

14 HONORABLE NATHAN HECHT: Could I ask,  
15 especially Judge Peeples, have there been campaign speech  
16 recusal cases?

17 HONORABLE DAVID PEEPLES: I can't recall  
18 any.

19 HONORABLE JAN PATTERSON: Yes.

20 HONORABLE NATHAN HECHT: White's been out  
21 there a while.

22 HONORABLE JAN PATTERSON: What?

23 HONORABLE DAVID EVANS: There was one in  
24 Tarrant County eight years ago based on one of the  
25 candidates, the prevailing candidate, was favored by the

1 doctors, and afterwards a leading member of the trial bar  
2 brought a motion to recuse based on those statements, and  
3 it was not granted, but there have been a few out there.

4 HONORABLE JAN PATTERSON: One in Austin  
5 based on a campaign promise, "You can count on me for tort  
6 reform," and there was a recusal motion.

7 CHAIRMAN BABCOCK: What happened to it, Jan?

8 HONORABLE JAN PATTERSON: A year after the  
9 motion was filed the judge recused himself.

10 MR. LOW: Chip, it looks like we have three  
11 choices, either put it all under appearance of  
12 impropriety --

13 CHAIRMAN BABCOCK: Right.

14 MR. LOW: Or -- and then second is put some  
15 note or suggestion for example, like Carl's talking about,  
16 or whether we adapt or adopt some form specifically trying  
17 to get around the violation of freedom of speech, whether  
18 we have a rule. It's got to be one of the three as far  
19 as --

20 CHAIRMAN BABCOCK: Okay. Yeah, Harvey.

21 HONORABLE HARVEY BROWN: I think I'm against  
22 having a specific rule. I think it's better to be in the  
23 general rule, and I think the tort reform one is kind of  
24 an interesting example because, at least in Harris County,  
25 if you were to say, "I'm against tort reform" and you're a



1 Republican, you're going to have a pretty hard time  
2 winning. If you say, "Oh, I'm not going to touch that  
3 one," that's going to be viewed by at least some voters as  
4 a negative comment on it. You know, there's plaintiffs  
5 lawyers who stand up in voir dire and say -- this one  
6 might do it over here, Mr. Perdue -- "I'm for tort reform,  
7 I know about these frivolous cases, and we need to do  
8 something about those," so maybe --

9 MR. PERDUE: "But this isn't one of those."

10 HONORABLE HARVEY BROWN: Huh? "But this  
11 isn't one of them," that's right.

12 HONORABLE STEPHEN YELENOSKY: It's amazing  
13 how all the good ones go to you.

14 HONORABLE HARVEY BROWN: That's right, and  
15 these general statements, you know, I think a lot of  
16 judges make general statements sometimes, but there's  
17 implicit in their mind the "but I'm going to follow the  
18 law," and I don't think we need to require them to state  
19 every time they offer some general philosophical view on  
20 whether we need tort reform or caps on damages or whatever  
21 it might be that's the hot item at the time, that they now  
22 have to make this prophylactic statement that "but of  
23 course I'm going to follow the law."

24 I think it's better to put it in the context  
25 of everything else these judges apparently consider it. I



1 mean, you know, if he said it, you know, the day before a  
2 trial that was going to be a huge case and a week before  
3 he got a big contribution from the defense lawyer and that  
4 defense lawyer happened to be his partner four years ago,  
5 well, you know, I think there might be something to  
6 consider, and a good judge like Judge Peeples would recuse  
7 them, but to have an absolute rule strikes me as then you  
8 almost have to get the judge involved in the recusal  
9 motion because then the judge may have to explain, "yes,  
10 but here's what I meant," or "here's my philosophy on this  
11 a little more fully." I'm just answering a shorthand  
12 questionnaire from one of these groups that says, "Are you  
13 in favor of tort reform?"

14                   And the other thing is, it just -- it does  
15 keep judges from being able to say anything. I mean,  
16 there were certain social topics that I did not discuss  
17 for seven years with anybody other than my wife, and, you  
18 know, because of that you're almost -- you almost had an  
19 inability to learn and to grow and to think and analyze  
20 issues, and I think that's bad, too, frankly. Of all the  
21 things we've talked about for judges that are problems,  
22 this strikes me as one of the least, except in the extreme  
23 examples where I think it will go easily in the other  
24 rules. So I'm against a specific rule.

25                   CHAIRMAN BABCOCK: Yeah, Frank.

1 MR. GILSTRAP: We're talking about taking  
2 the commit rule that's in the Code of Judicial Conduct and  
3 adding a provision like that that requires recusal.  
4 That's generally what we're talking about, right?

5 CHAIRMAN BABCOCK: Well, not necessarily.  
6 We could be -- we could be talking about the rule -- the  
7 canon that was struck down and putting it in a recusal  
8 rule on the theory that we're not prohibiting speech,  
9 we're just -- here's the consequences of what's going to  
10 happen if you do speak.

11 MR. GILSTRAP: Okay. But I was under the  
12 impression we're not talking about taking the commit rule  
13 out of the Code of Judicial Conduct. It hasn't been  
14 struck down yet, and we don't need to -- we're not talking  
15 about getting out in front of the Supreme Court and  
16 thinking what they might do.

17 CHAIRMAN BABCOCK: That's right. Okay.  
18 Judge Patterson.

19 HONORABLE JAN PATTERSON: One of the  
20 interesting things that occurred after the Supreme Court  
21 case came down was that many special interest groups sent  
22 out mailings to their constituents saying, "Ask your judge  
23 this question because now they can answer it." So I think  
24 it would be a favor to judges to have a rule that people  
25 can follow and would be, if not a bright line, at least

1 some information for judges to avoid those types of  
2 discussions.

3 CHAIRMAN BABCOCK: Uh-huh. Yeah, Carl, and  
4 then Buddy.

5 MR. HAMILTON: There's another distinction  
6 in --

7 CHAIRMAN BABCOCK: Have you noticed you guys  
8 are both speaking together? If one speaks, the other one  
9 speaks.

10 MR. LOW: But I don't know what I'm going to  
11 say, and he doesn't know what I'm going to say.

12 CHAIRMAN BABCOCK: Go ahead, Carl.

13 MR. HAMILTON: The question that the judge  
14 hearing the motion has to decide on impartiality or bias  
15 or prejudice is a subjective judgment on the part of the  
16 judge.

17 CHAIRMAN BABCOCK: Uh-huh.

18 MR. HAMILTON: But under this rule if  
19 there's uncontroverted evidence that the statement was  
20 made then there's no question about whether it's  
21 impartiality or not. It's just the fact that the  
22 statement was made is the ground for recusal, and that  
23 would be the only evidence that would have to be  
24 introduced, is that statement A was made and based upon  
25 that the judge should grant recusal, regardless of whether

1 the judge comes in and says, "Well, I really didn't mean  
2 that," or whatever, then it becomes a subjective judgment  
3 on the part of the judge hearing the motion.

4 MR. LOW: But that's what it starts out  
5 with, but first the trial judge examines it, so you get --  
6 you get really a hearing or a decision by a judge that  
7 knows about it, and if he feels he's disqualified or an  
8 appearance, he can do so. Then you get a second judge,  
9 but if any of these things don't come within the  
10 appearance of impropriety then I don't think it should be  
11 a ground.

12 CHAIRMAN BABCOCK: Uh-huh. Good point.  
13 What you're saying is if you adopt something like the ABA  
14 rule, you're expanding it.

15 MR. LOW: Yeah.

16 CHAIRMAN BABCOCK: Appearance of  
17 impropriety.

18 MR. LOW: And you are; and that should come  
19 within this general rule; and we have to have some ground  
20 for judgment of people, because that's what the courts are  
21 based upon, and all of these come within that; and when we  
22 start just giving one, two, three, you do this this way,  
23 this way, that way, you give up the right to be flexible  
24 and do what you think is fair and just; and you have two  
25 judges before your motion is overruled. You have two

1 decisions.

2 CHAIRMAN BABCOCK: Uh-huh. Yeah. Good  
3 point. Okay. Jim.

4 MR. PERDUE: (Shakes head.)

5 MR. HAMILTON: Two decisions?

6 MR. LOW: Yeah. The trial judge has to  
7 first, if he thinks he's disqualified, he has to decide,  
8 and if he doesn't then it goes to the other.

9 CHAIRMAN BABCOCK: Are you talking to Carl  
10 now?

11 MR. LOW: Disregard.

12 CHAIRMAN BABCOCK: He's trying to prompt  
13 Carl to say something. Yeah, Judge Christopher.

14 HONORABLE TRACY CHRISTOPHER: Well, I mean,  
15 if we took old 5.1 and turned it into a disqualification,  
16 that would be a lot broader than the ABA language.

17 CHAIRMAN BABCOCK: Yeah.

18 HONORABLE TRACY CHRISTOPHER: And my problem  
19 with the ABA language is it sort of combines the pledges  
20 or promises language and throws in "appears to commit,"  
21 you know, on top of it, which, you know, isn't the way we  
22 talk about pledges or promises in our current rule of  
23 judicial conduct. And to me if we turned our old Canon  
24 5.1 into a recusal, it would be way too broad, in my  
25 opinion. It would be "A judge or a judicial candidate has





1 made a statement that indicates an opinion on any issue  
2 that may be subject to judicial interpretation by the  
3 office which is being sought or held, except that a judge  
4 or a judicial candidate may discuss the individual judge's  
5 philosophy if stated in a manner which does not suggest to  
6 a reasonable person a probable decision on any particular  
7 case." Just taking the old language and made it into a  
8 recusal standard. To me, that's extremely broad and --  
9 but it's the only thing that would actually protect a  
10 judge who didn't want to talk.

11 HONORABLE DAVID EVANS: Well, you have a  
12 few -- you know, there's another problem. You have a few  
13 judges who have served in the Legislature that are on the  
14 bench now. There's no doubt they made commitments, public  
15 records and votes. How long does this absolute  
16 disqualification last? Two decades?

17 HONORABLE STEPHEN YELENOSKY: But they  
18 didn't make a commitment when they were legislators to --  
19 that could be interpreted as a ruling in a case.

20 HONORABLE DAVID EVANS: Well --

21 HONORABLE STEPHEN YELENOSKY: I mean, they  
22 can commit to passing legislation.

23 HONORABLE DAVID EVANS: But they've made  
24 certain position statements --

25 HONORABLE STEPHEN YELENOSKY: Sure.

1 HONORABLE DAVID EVANS: -- and they've made  
2 public commitments, not while a judge and not while a  
3 judicial candidate. I recognize the object on -- but  
4 those persons whenever they go on the bench always worry  
5 that at some later time that those prior votes would  
6 become the matter of recusal, and they go through this --  
7 but they've clearly made a process, and then the presiding  
8 judges make a decision as to whether or not they're so  
9 closely identified with an issue that they can't be fair  
10 or not. We have those problems. We have a few of them  
11 out there right now. I worked for a state senator that's  
12 on the state court of appeals now, you know, 25 years ago  
13 he was a state senator and then went on the bench, so you  
14 have those now.

15 CHAIRMAN BABCOCK: Justice Christopher.

16 HONORABLE TRACY CHRISTOPHER: Well, I don't  
17 know about you, but I got a robocall from a judicial  
18 candidate that said, "I've been in the state Legislature.  
19 You know my views on the issues, unlike all these other  
20 judges who can't tell you a thing about what they're  
21 thinking. You know how I'm thinking. Vote for me."

22 HONORABLE DAVID EVANS: And that's bringing  
23 information while a judicial candidate, which most of them  
24 shy away from.

25 HONORABLE TRACY CHRISTOPHER: But all it

1 said was "You know what I'm thinking." He hasn't appeared  
2 to commit to any particular thing anywhere.

3 CHAIRMAN BABCOCK: But it depends on who is  
4 doing the appearing. Yeah, Richard.

5 MR. MUNZINGER: The beauty of the rule that  
6 allows the recusal where impartiality might reasonably be  
7 questioned is, is that it allows the litigant with the  
8 courage to do so to question the legislative conduct or  
9 the legislative campaigns of the man who or woman who made  
10 the robocall to Judge Christopher; and if you codify the  
11 existing 5.1; it limits -- pardon me, at least it can be  
12 interpreted as limiting a party's or a litigant's right to  
13 seek recusal. What we're entitled to, it seems, as a  
14 judge, we all have personal beliefs, but the judge should  
15 not allow their personal beliefs to overcome the oath to  
16 support the Constitution and the law. There are a lot of  
17 people who allow their personal opinions or personal  
18 interests to do so, and that's the ones we don't want to  
19 be the trial judges, but this Rule 18b(1) and (2), those  
20 two subparts leave us free as litigants and lawyers to  
21 challenge anybody.

22 Under all the circumstances that have been  
23 hypothesized this afternoon you could make a challenge  
24 against a sitting judge, under every circumstance that we  
25 have discussed, and you would be able to assert it without

1 having to put yourself into the pigeonholes of a public  
2 statement, a promise, or anything else. It would allow  
3 the litigant with the courage to do so to test the  
4 objectivity of the judge and his or her loyalty to the  
5 Constitution and to their oath.

6 CHAIRMAN BABCOCK: Yeah, Harvey, and then  
7 Levi.

8 HONORABLE HARVEY BROWN: When we debated  
9 this a couple of times ago we were told that in recusal  
10 motions the judges do consider these things, and that was  
11 somewhat a surprise to me about, for example, campaign  
12 contributions. I wonder if there would be some help and  
13 clarification if we had kind of a totality of the  
14 circumstances rule that said in considering recusal you  
15 can consider things such as campaign contributions, timing  
16 of contributions, public statements, et cetera, that  
17 allows a little more discretion and tells the bar, "Here  
18 are things that are relevant, but none of them are  
19 determinative in and of themselves." It seems to me that  
20 would address some of these problems.

21 CHAIRMAN BABCOCK: Levi, and then Judge  
22 Yelenosky, and then Buddy.

23 HONORABLE LEVI BENTON: I have a question  
24 for Richard and then just a follow-up comment. It wasn't  
25 clear to me whether Richard was saying that would be a

1 good result that it would allow the litigant with the  
2 courage to do so to test the judge's commitment to his or  
3 her oath. And the other thing that needs to be said is  
4 how does a judge prove that? I mean, Justice Christopher  
5 is not going to file a response and come argue, "Well, I  
6 didn't mean that."

7                   MR. MUNZINGER: Well, we had a lady who ran  
8 for office some years ago in El Paso who was very publicly  
9 vociferous in stating her position about a woman's right  
10 to choose, about the narrowness of people who oppose that  
11 right to choose, et cetera, and this was at a time when  
12 there were a lot of abortion protestors who were being  
13 prosecuted in criminal court, which have would have  
14 included her court, for protests, and there was still some  
15 arguments that people were making about the  
16 constitutionality or what have you of that or about the  
17 interpretation of the law of necessity under the Penal  
18 Code. The woman, in my opinion, clearly disqualified  
19 herself from presiding over a criminal trespass case in  
20 which the law -- the defense of necessity was positive.  
21 That defense has since been thrown out by the courts. She  
22 had no business accepting those cases, and in those days  
23 she shouldn't have been saying what she said. It was a  
24 violation of the canons of ethics, but the beauty of the  
25 rule that you have right now is you could go in with that

1 lady and say, "Your impartiality is reasonably subject to  
2 question because of your comments as reported in the *El*  
3 *Paso Times* on the A, B, C date," period.

4 HONORABLE STEPHEN YELENOSKY: Because she  
5 said she was a strong supporter of women's rights? I  
6 mean, would I be recused because I say I'm a strong  
7 supporter of civil rights and that I think Title 7 and the  
8 State Commission on Civil Rights Act ought to be fully  
9 enforced? I can't hear a discrimination case?

10 MR. MUNZINGER: I don't think that's the law  
11 at all, and I wouldn't make that argument. As I said, if  
12 I had the courage to file the motion. That's a big  
13 question, do I have the courage to file the motion. The  
14 lady that I had in -- I paraphrased what was said. It  
15 was --

16 HONORABLE STEPHEN YELENOSKY: Well, it gets  
17 back to my question that there are things -- I think the  
18 partiality or impartiality is an important point, because  
19 nobody would say if I said, "I support antidiscrimination  
20 law, and I think it ought to be enforced" that that means  
21 that I'm partial and everybody who comes in with a  
22 discrimination case is going to win, and so --

23 MR. MUNZINGER: I agree with that.

24 HONORABLE STEPHEN YELENOSKY: -- you know,  
25 so if you say did I announce a particular result, I guess

1 you could say "no," but I can give you another example. I  
2 could say, "If you come in for a TRO and you don't have a  
3 verified petition, you are not going to get a TRO."  
4 That's my commitment. All right. So should I get recused  
5 because of that? I've told you you are not going to get a  
6 TRO without a verified petition. The reason I'm not  
7 recused is because nobody thinks that indicates  
8 partiality, but literally I have announced and maybe --  
9 and literally I have committed to a particular result. So  
10 it's not so easy as just to say, you know, you look at  
11 whether they've announced a position committed to a  
12 particular result.

13 CHAIRMAN BABCOCK: It means you're a strict  
14 constructionist. That's what it means. Levi.

15 HONORABLE LEVI BENTON: I think we've got to  
16 say it for the record that in trying cases before Judge  
17 Yelenosky order isn't required. You're not required to  
18 wait until your opponent passes a witness before you start  
19 your own examination. Now, that being said --

20 HONORABLE STEPHEN YELENOSKY: Richard was  
21 out of order before. He spoke in front of me.

22 HONORABLE LEVI BENTON: The import of what I  
23 was trying to get at, you said it would be a good thing.  
24 It would be a good thing if there's more motions to recuse  
25 filed -- I'm sorry, would it be a good thing if people

1 have the courage to file these motions? Will there be  
2 more motions, and is that a good result? And if we go  
3 back to the cottage industry of recusal motion here,  
4 recusal motion there, recusal motion here and everywhere,  
5 is that a good thing?

6 MR. MUNZINGER: All I was saying was we are  
7 being asked to draft a rule, and my personal belief is  
8 that the generality of subsections (1) and (2) are  
9 beneficial and that it would be counterproductive in my  
10 opinion to have more specific subsections that articulate  
11 various circumstances, which I think are unnecessary.

12 Once again, if I have the courage of my  
13 convictions and I feel strongly enough that Judge  
14 Yelenosky is not going to be fair to me because it's a  
15 labor discrimination case in his court, and he campaigned  
16 saying Title 7 was good or what have you, if I'm stupid  
17 enough to file that motion, I'm stupid enough to file it.  
18 On the other hand, if Judge Yelenosky has said something  
19 more specific than what he said and I have serious concern  
20 about whether he can, in fact, be fair to me then I can  
21 raise that question and do it, and I'm not dissuaded from  
22 doing so by other subsections of the rule that suggest to  
23 the practitioner that it has to be made in a public  
24 statement, it has to imply some precommitment or  
25 prejudice. That's the basic question, is he going to be





1 fair to me, and I think that the rules as presently  
2 drafted are sufficiently broad to let people with the guts  
3 to do it do it.

4 CHAIRMAN BABCOCK: Buddy, and then Carl, I'm  
5 sure.

6 MR. LOW: You know, Harvey made -- of course  
7 -- a suggestion, and in concept I agree. But if we start  
8 giving examples we're going to leave out one or two, and  
9 somebody is going to say, "Well, the rules didn't even  
10 think of that. That's not important enough for them to  
11 think of," and we can't list them all. In concept, I  
12 totally -- that was -- I had the same idea, but I'm afraid  
13 there's some danger in doing that because you can't list  
14 all the circumstances and say, "Well, Judge, that's not  
15 important, that's not even an example."

16 CHAIRMAN BABCOCK: Yeah. I'm in a voting  
17 mood.

18 MR. LOW: Let's do it. Carl agrees.

19 CHAIRMAN BABCOCK: How many people agree  
20 with Munzinger here that (1) and (2) about a judge's  
21 impartiality might reasonably be questioned or a judge has  
22 personal bias or prejudice concerning the subject matter  
23 or a party, that that's enough, that we don't need to get  
24 into this morass of other things? How many people agree  
25 with that?

1 MR. LOW: We'll second that.

2 HONORABLE STEPHEN YELENOSKY: I'm not sure  
3 what we're voting on, but --

4 HONORABLE TOM GRAY: Just raise your hand.

5 CHAIRMAN BABCOCK: How many people feel  
6 otherwise, feel we need to have a rule? Okay. 17 to 2  
7 think that the current rule is sufficient.

8 MR. LOW: Now you see why I have to talk  
9 when Carl speaks.

10 CHAIRMAN BABCOCK: Exactly. Well, listen,  
11 this has been an interesting discussion. We'll have a lot  
12 to talk about next time.

13 MR. MEADOWS: What will be the principal  
14 topics next time? Do you know already?

15 CHAIRMAN BABCOCK: I don't know. We still  
16 have to catch up with Elaine, who has got much to do on  
17 Rules 296 through 329.

18 MS. SENNEFF: Juror questions.

19 CHAIRMAN BABCOCK: Huh?

20 MS. SENNEFF: Juror questions.

21 CHAIRMAN BABCOCK: And we've got the juror  
22 question rule that keeps getting put off, and we'll have  
23 to come back to this recusal rule, so but the exact order  
24 -- and the date is August 27th, but that date may change,  
25 and we'll let you know quickly if it does. So that's the

1 best I can do.

2 MR. GILSTRAP: Chip, do you want anything  
3 more on 5.1?

4 HONORABLE NATHAN HECHT: No.

5 MR. GILSTRAP: We're done.

6 CHAIRMAN BABCOCK: We're done on 5.1.

7 HONORABLE NATHAN HECHT: Thank you.

8 CHAIRMAN BABCOCK: Which is heroic on your  
9 part. But I move to adjourn, and let's go hang General  
10 Abbott.

11 (Meeting adjourned at 2:26 p.m.)

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**REPORTER'S CERTIFICATION**  
MEETING OF THE  
SUPREME COURT ADVISORY COMMITTEE

\* \* \* \* \*

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 4th day of June, 2010, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$ 1,272.50 .

Charged to: The Supreme Court of Texas.

Given under my hand and seal of office on this the 16th day of June, 2010.

D'Lois L. Jones  
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